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No. 93-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MR. SPROUT, INC., TRAY WRAP, INCORPORATED, COUNTRY WIDE PRODUCE, INCORPORATED, G&T TERMINAL PACKAGING CO., INC.,

Petitioners,

v.

UNITED STATES OF AMERICA, and INTERSTATE COMMERCE COMMISSION,

Respondents,

and

CONSOLIDATED RAIL CORPORATION, and ATCHISON, TOPEKA, and SANTA FE RAILWAY COMPANY,

Intervenors.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

A panel of the United States Court of Appeals for the Second Circuit affirmed that part of the decision of the Interstate Commerce Commission which held that the Consolidated Rail Corporation ("Conrail") did not engage in unlawful discrimination by imposing a surcharge on shipments of produce to Petitioners.

The question presented is:

> Whether, in view of its longstanding statutory mandate to protect shippers from unlawful rate discrimination by rail carriers, the Interstate Commerce Commission was statutorily obligated to revoke Conrail's regulatory exemption so as to remedy Conrail's imposition of an illegal retaliatory rate increase upon only these Petitioners who dared to exercise their statutory and constitutional right to file claims against the railroad for loss and damage to their goods.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Court of Appeals for the Second Circuit were Mr. Sprout, Inc., Tray Wrap, Incorporated, Country Wide Produce, Incorporated, G&T Terminal Packaging Co., Inc., United States of America, Interstate Commerce Commission, Consolidated Rail Corporation, and Atchison, Topeka, and Santa Fe Railway Company.

Pursuant to Rule 29 of the Rules of the Supreme Court of the United States, there are no parent or subsidiary companies of Petitioners.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

No. 93-

MR. SPROUT, INC., TRAY WRAP, INCORPORATED, COUNTRY WIDE PRODUCE, INCORPORATED, G&T TERMINAL PACKAGING CO., INC.,
Petitioners,

V.

UNITED STATES OF AMERICA, and INTERSTATE COMMERCE COMMISSION,
Respondents,

and

CONSOLIDATED RAIL CORPORATION,
Intervenors.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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G&T Terminal Packaging Co., Inc. ("G&T"), Mr. Sprout, Inc., Tray Wrap, Inc., and Country Wide Produce, Inc. (collectively, the "Petitioners") petition for a writ of certiorari to review that part of the judgment of a panel of

the United States Court of Appeals for the Second Circuit that affirmed the denial of Petitioners' rate discrimination claims by the Interstate Commerce Commission ("Commission" or "ICC").

OPINIONS BELOW

The opinion of the court of appeals denying the petition for rehearing is not reported and is reprinted in the appendix to this petition, infra, at A1-A2. The opinion of the court of appeals affirming in part and reversing in part the decision of the Interstate Commerce Commission is reported at 8 F.3d 118 (2d Cir. 1993), and is reprinted in the Appendix to this petition, infra, at B1-B30. The decision of the ICC is not reported and is reprinted in the Appendix, infra, at C1-C47. The decision of the ICC's Chief Administrative Law Judge ("ALJ") is not reported and is reprinted in the Appendix, infra, at D1-D122.

JURISDICTION

The court of appeals entered its judgment on October 25, 1993. In an unreported order, the court of appeals denied the petition for rehearing by G&T Terminal Packaging Co., Inc. ("G&T"), Mr. Sprout, Inc., Tray Wrap, Inc., and Country Wide Produce, Inc. on January 3, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 10505(a) of Title 49, United States Code, states in pertinent part:

(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the Commission shall exempt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle --

> (1) is not necessary to carry out the transportation policy of section 10101a of this title; and
>
> (2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power. . .

(d) The Commission may revoke an exemption, to the extent it specifies, when it finds that application of a provision of this subtitle to the person, class, or transportation is necessary to carry out the transportation policy of section 10101a of this title.

2. Section 10101a of Title 49, United States Code, states in pertinent part:

In regulating the railroad industry, it is the policy of the United States Government . . .

> (13) to prohibit predatory pricing and practices, to avoid undue concentration of market power and to prohibit unlawful discrimination.

3. Section 10741(a) of Title 49, United States Code, states that a common carrier:

> may not charge or receive from a person a different compensation (by using a special rate, rebate, drawback, or another means) for a service rendered, or to be rendered, in transportation the carrier may perform under this subtitle than it charges or receives from another person for performing a like contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances. A common carrier that charges or receives such a different compensation for that service unreasonably discriminates.

STATEMENT OF THE CASE

This case presents the Court with a significant issue concerning the chronic failure of the Interstate Commerce Commission to comply with its Congressional mandate to regulate rail carriers that engage in unlawful discrimination. For the past ten years, the Consolidated Rail Corporation ("Conrail") has unlawfully discriminated against Petitioners, receivers of fresh produce, by imposing a surcharge on each shipment Petitioners receive from the carrier. Conrail has imposed the surcharge in an effort to discourage Petitioners from exercising their right to file loss and damage claims for produce that Conrail has damaged during shipment. This petition for certiorari raises novel questions concerning the circumstances under which the ICC must exercise its power to revoke an exemption from regulation provided to a rail

carrier that engages in unlawful discrimination against a customer.

Petitioners receive fresh produce moving from the western United States via the Consolidated Rail Corporation ("Conrail") to their facilities in the Kingsbridge and Hunts Point sections of the Bronx, New York. In May 1983, without any notice or explanation of the reason for its action, Conrail imposed exclusively upon Petitioners a discriminatory surcharge of more than $500 on each shipment of produce Petitioners received from the rail carrier. Conrail offered to reduce the surcharge if Petitioners agreed not to exercise their right under the Interstate Commerce Act to file loss and damage claims against the carrier. D6-D7. In a letter, dated June 30, 1983, Richard A. Mehley, the General Attorney for Conrail, offered to reduce the surcharge to $100 on the express conditions "that no loss and damage claims be filed by G&T Terminal on this traffic" and that "no cars be rejected by G&T Terminal." D6-D7. Neither G&T Terminal nor any of the other petitioners agreed to forego their right to file loss and damage claims, and over the next ten years, Conrail imposed a surcharge between $500 and $800 on every shipment to Petitioners.

In February 1991, after years of procedural wrangling, in which the ICC repeatedly refused to acknowledge its jurisdiction over Petitioners' revocation applications (and during which the surcharge remained in effect), the ICC's Chief Administrative Law Judge (the "ALJ") found that Conrail's cost of providing service to Petitioners was not materially different from its cost of providing service to their competitors. D112. The ALJ determined that Conrail's imposition of the surcharge

unlawfully discriminated against Petitioners and warranted the revocation of the rail carrier's exemption from regulation. D117. The ALJ further determined that revocation was also warranted because of Conrail's unreasonable practice of endorsing false damage claim reports prepared by inspection agencies reviewing Petitioners' loss and damage claims. D114-D117.

Over a dissent, the Commission reversed the decision of its Chief ALJ, finding that Petitioners had not demonstrated discrimination or competitive injury, because the location where Petitioners received Conrail shipments was in a different part of the Bronx than the location of its competitors, which were not subject to the surcharge. C23-C24. The Commission also reversed the ALJ's decision to revoke Conrail's exemption based on its endorsement of false inspection reports. Despite acknowledging that the evidence suggested Conrail knowingly endorsed false inspection reports designed to insulate the carrier from liability, the Commission asserted that it lacked jurisdiction to "prescribe how carriers should investigate loss and damage claims." C38.

The court of appeals affirmed the ICC's decision that Conrail's surcharge did not constitute unlawful discrimination, but reversed the ICC's decision that it lacked jurisdiction to resolve Petitioners' claims that Conrail had engaged in an unreasonable practice of endorsing false inspection reports. B30.

A. Statement of Facts

In 1980, the Interstate Commerce Commission exempted from regulation the rail transportation of certain

agricultural commodities, including potatoes, the traffic at issue in this case. Ex Parte No. 436 (Sub No. 2), Rail General Exemption Authority -- Miscellaneous Commodities, 45 Fed. Reg. 204 (1980); see 49 C.F.R. § 1039.10. However, in order to protect captive businesses receiving shipments over deregulated traffic, Congress authorized the ICC to revoke an exemption from regulation to the extent necessary to curb abuses by rail carriers. Pursuant to 49 U.S.C. § 10505(d), the Commission may revoke an exemption from regulation when "necessary to carry out the transportation policy of section 10101a of [Title 49]." Congress has established the "prohibit[ion of] unlawful discrimination" as one element of the transportation policy of the United States. 49 U.S.C. § 10101a(13).

1. The Imposition of the Discriminatory Discharge

In May 1983, without prior notice, Conrail imposed a surcharge of $500 to $800 per car upon every shipment of produce, including potatoes, received by Petitioners. That month, Conrail notified connecting western rail carriers that shipments to the New York City area would carry the surcharge if destined for Kingsbridge, a section of the Bronx where the Petitioners were the primary recipients of commodity shipments. D6-D7. When Conrail suspected that Petitioners were operating at locations other than Kingsbridge, it sent telegrams to all western rail carriers stating that the surcharge applied to Petitioners' shipments to any destination on Conrail. D25. Since 1983, Conrail has imposed the surcharge at all locations at which Petitioners have received shipments.

The purpose of the surcharge was to deter Petitioners from exercising their right, under the Interstate Commerce Act, to file claims against Conrail for loss and damage occurring to produce on their shipments. Just two months after imposing the new freight charge, Conrail offered to reduce almost the entire surcharge in exchange for Petitioners' agreement not to file any further loss and damage claims. D6-D7. In a June 30, 1983, letter to G&T Terminal's counsel, Conrail's General Attorney offered to reduce the surcharge on shipments to petitioners at Kingsbridge to "$100 above the Hunts Point charges." Conrail demanded, as express conditions of the reduced charges, that "no loss and damage claims be filed by G&T Terminal on this traffic" and that "no cars be rejected by G&T Terminal." D6-D7. As determined by the ALJ in a factual finding not challenged by the ICC or the court of appeals, "Conrail in effect insisted that petitioners surrender any rights they had under the [Interstate Commerce] Act to file claims seeking payment for damages caused to produce shipped to them in return for Conrail agreeing to eliminate some, but not all, of the added freight charge." D8.[1]

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[1] Conrail's argument before the Commission and the court of appeals, made more than eight years later, that the surcharge covered the costs it incurred in processing Petitioners' loss and damage claims cannot be squared with its initial offer. Even had Petitioners agreed at the outset to forego their statutory right to file loss and damage claims against the rail carrier, Conrail still intended to charge Petitioners a $100 surcharge on each shipment of produce received by them. In fact, before imposing the surcharge, Conrail strategized to "get rid of" Anthony Spinale, the principal of Petitioners G&T Terminal and Mr. Sprout.

When Petitioners approached the ICC in an effort to combat Conrail's abusive practice, the Commission disclaimed any jurisdiction over the issue of whether the surcharge constituted discriminatory rate fixing. In a letter, dated October 11, 1983, the Director of the Office of Proceedings for the Commission advised Petitioners to proceed in the courts:

> The Interstate Commerce Commission no longer exercises jurisdiction over the rates charged by railroads for the movement of the commodities covered by the exemption or over the practices engaged in by the railroads in the course of transporting them. Because your client and its affiliates appear to deal only in products covered by the agricultural commodities exemption, any dispute they may have with Conrail, or other railroads, would have to be settled in the courts rather than before the commission.

D10-D11.

2. <u>The New Jersey Litigation</u>

In March 1984, relying upon the ICC's professed lack of jurisdiction, Petitioners commenced an action against Conrail in federal district court in New Jersey. Among other theories of liability, Petitioners claimed violations of the Interstate Commerce Act and the common law duty of a common carrier to provide service at reasonable and non-discriminatory rates. On cross-motions for summary judgment, the district court dismissed the claims asserted under the Interstate Commerce Act, but rejected Conrail's

contention that federal law pre-empted Petitioners' common law remedies. After extensive discovery, a pretrial conference was held on September 20, 1985, and the case was ready for trial.

Just one week after the pretrial conference, however, Conrail petitioned the ICC for a declaratory order "that all common law remedies with respect to railroad rates and conditions of service are preempted by the [Interstate Commerce] Act notwithstanding the exemption" of the relevant traffic from regulation. Departing from its prior determination that it lacked jurisdiction to entertain Petitioners' unlawful rate discrimination claims, the Commission reversed its position and ruled that it retained exclusive jurisdiction over these claims. According to the Commission, "the only recourse of an aggrieved shipper such as G&T is to seek a revocation of the applicable exemption as to its shipments." Armed with the new ICC decision, Conrail again moved for summary judgment in the District Court. A second district judge to whom the renewed summary judgment motion had been assigned agreed with Conrail that because the Interstate Commerce Act pre-empted Petitioners' common law claims, those claims should be dismissed. G&T Terminal Packaging Co. v. Conrail, 646 F. Supp. 511 (D.N.J. 1986). A divided panel of the Third Circuit Court of Appeals affirmed the judgment of the district court. G&T Terminal Packaging Co. v. Conrail, 830 F.2d 1230 (3d Cir. 1987), cert. denied, 485 U.S. 998 (1988).

3. The Revocation Proceedings

On July 15, 1988, having been directed back to the administrative forum in which, ironically, they had first sought review of Conrail's discriminatory surcharge, G&T, Mr. Sprout and Tray Wrap petitioned the ICC to revoke Conrail's exemption from regulation. D21. Petitioners asserted three bases for revocation: first, that Conrail engaged in unlawful discrimination by imposing the surcharge on their shipments, in violation of 49 U.S.C. §§ 10101a(13) and 10741; second, that Conrail employed the surcharge as a device to discourage Petitioners from exercising their right to file loss and damage claims on Conrail's shipments, a right guaranteed by 49 U.S.C. § 11707; and third, that Conrail engaged in an unreasonable practice of knowingly endorsing false inspection reports that were designed to discredit Petitioners' loss and damage claims, in violation of 49 U.S.C. § 10701.

In August 1990, the ICC referred the merits of the case to the Commission's chief Administrative Law Judge. In February 1991, the ALJ ruled in favor of Petitioners with regard to their initial claim of unlawful discrimination by Conrail in the rates charged for the shipment of western potatoes. D117. The ALJ concluded that there was "no doubt" that competing receivers obtained a competitive advantage from the surcharge imposed on Petitioners. C103. Finding that the surcharge was not justified by differing transportation circumstances at Kingsbridge,[2] where

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[2] Before the imposition of the surcharge against Petitioners, Conrail had charged the same rate for shipments to Kingsbridge as it did for shipments to Hunts Point, a

Petitioners received shipments, the ALJ concluded that Petitioners "establishe[d] that the rate they are charged by Conrail for the transportation of 'western potatoes' is different from other rates assessed for shipments of potatoes to Hunts Point, Mt. Kisco and Mt. Vernon, which are at or near Kingsbridge . . . ." D111.

The ALJ further held that Conrail's endorsement of false and misleading reports of railroad inspection agencies constituted an "unreasonable practice" that also warranted the revocation of its exemption. The ALJ found that the inspection agencies, by routinely slanting their reports in Conrail's favor, unreasonably escalated Conrail's cost of processing claims for loss and damage. Conrail's control of the manner in which inspectors prepared their reports was, in the words of the ALJ, "designed to protect the railroads from the payment of claims and to give the Railroad Claims Bureau of Conrail a 'fighting chance' to dispute claims. . . [A]s a rule inspectors must write reports which cannot be used to support a claim against the railroad." D48.

On administrative appeal, the Commission vacated the decision of the ALJ and denied the petition for revocation in all respects.[3] First, the Commission held that paragraph (f)

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section of the Bronx just nine miles from Kingsbridge. D40.

[3] In this petition, we are not seeking review of the Commission's decision to overturn the ALJ's determination that Conrail possessed market power over the shipment of Idaho potatoes to the New York City area and that Conrail abused this market power by imposing the surcharge on Petitioners.

of section 10741, which provides that the statutory prohibition against discrimination "shall not apply to . . . rail rates applicable to different routes" (emphasis added), barred a finding of unlawful discrimination against Petitioners. While acknowledging that Kingsbridge, Hunts Point, Mt. Kisco and Mt. Vernon were all located in the New York City area, C23, the Commission dismissed as irrelevant the fact that the rail rates applicable to Petitioners' shipments at Kingsbridge, even with the surcharge, were significantly higher than the rates applicable to receivers at these other locations. Relying upon a distinction not recognized by the statute, the Commission held that discriminatory pricing could not occur with regard to these destinations, all of which were within the New York City area, because these routes technically were on "different lines." C23-C24.

Second, the Commission disputed its Chief ALJ's finding that the surcharge caused Petitioners' competitive injury. Without explaining how a surcharge imposed only on Petitioners would not automatically advantage their competitors, the ICC speculated that "even if the petitioners did suffer lost sales overall following the imposition of the surcharge, we see no showing that the surcharge in itself was the principal reason for any losses it may have incurred." C26.

Third, the Commission intimated that Conrail's surcharge may have been justified by different transportation circumstances on the theory that Conrail incurred special costs in resolving Petitioners' comparatively high number of loss and damage claims. However, the ICC could not say with "absolute certainty" that the surcharge matched Conrail's claims-related costs. C34.

With regard to the ALJ's finding that revocation was also warranted because of Conrail's endorsement of false inspection reports, the Commission ruled that its jurisdiction to remedy "unreasonable practices" by a rail carrier did not extend to freight inspections. Declining to upset the ALJ's finding that Conrail had knowingly relied upon slanted inspection reports as part of a systematic effort to deny Petitioners' loss and damage claims, the ICC simply disclaimed jurisdiction over Petitioners' contention that the carrier's endorsement of false inspection reports amounted to an abusive practice. To the extent that the Commission addressed this claim at all, it was to acknowledge the validity of the ALJ's finding that "extensive evidence show[s] unreasonable buildup of claims processing costs by the inspection agencies [and] Conrail['s] encourage[ment of] this cost buildup." C36. The ICC reasoned, however, that because it had no authority under the Interstate Commerce Act to resolve loss and damage claims, it lacked jurisdiction even to determine whether Conrail's knowing endorsement of false reports constituted an "unreasonable practice." C37-C38.[4]

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[4] As the ICC recognized:

> From a review of the evidence before us, particularly the videotaped depositions, it appears that Conrail at a minimum was aware of the preparation of reports that petitioners felt were slanted. A number of inspectors testified that reports often had to be rewritten using certain terminology improperly shifting blame for damage away from the railroad, because 'the railroad wants it done this way.'

4. The Decision of the Court of Appeals

The court of appeals affirmed that part of the Commission's decision which held that Petitioners had failed to present a prima facie case of rate discrimination under section 10741. The court of appeals held that Petitioners had failed to carry their burden of showing (1) that Conrail had exacted different rates for "performing a like and contemporaneous service," "in the transportation of a like kind of traffic," "under substantially similar circumstances," as required by 49 U.S.C. § 10741(a), and (2) that this rate disparity had caused Petitioners to suffer a competitive disadvantage. The court of appeals held that Petitioners had failed to prove who their competitors were and what rates their competitors paid. The court ruled that "without this information, the Commission was unable to make a finding . . . that [the] alleged rate differential caused competitive harm to the subject shippers." B18-B19.

In reaching this conclusion, the court of appeals misread the record and mischaracterized Petitioners' position. The court stated that "Petitioners . . . indicate that their primary point of receipt was at Kingsbridge, while the rates they seemed to complain about applied to other points in the New York City area, such as Hunts Point, Mt. Kisco, and Mt. Vernon." B20. However, there was no dispute that Petitioners also received shipments at Hunts Point and that Conrail also imposed the surcharge on shipments to

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> It also appears that petitioners frequently complained to Conrail about what the inspectors were doing.

C36.

Petitioners, but to no other receivers, at that location. C23. Moreover, the court held that even if petitioners had made out a prima facie case, their discrimination claim would still fail. Though Conrail, as even the ICC acknowledged, had failed to demonstrate a precise correlation between the costs of processing Petitioners' claims and the surcharge itself, the court held that the disparity in rates was warranted by the differing transportation conditions between Petitioners and their competitors -- namely, the costs imposed on Conrail in processing Petitioners' loss and damage claims. Not to impose the surcharge on petitioners, in the words of the court of appeals, "would relieve them of the responsibility for the costs they generate." B23.

The determination that the surcharge was reasonable because Petitioners' loss and damage claims had "generated" unique processing costs for Conrail was at odds with the rest of the court's decision, which reversed the ICC's decision that it lacked jurisdiction over Conrail's "unreasonable" freight inspection practices. Though the court of appeals held that the Commission did have jurisdiction to resolve Conrail's endorsement of false inspection reports, the court failed to recognize the implication of Conrail's unreasonable practice on the lawfulness of the surcharge. Because Conrail had escalated its costs of processing Petitioners' loss and damage claims, the court of appeals had no basis on which to assume that Petitioners were responsible for "generat[ing]" the processing costs incurred by Conrail.

REASONS FOR GRANTING THE WRIT

I. The ICC Has Abrogated Its Statutory Mandate To Regulate Rail Carriers When Necessary To Protect Receivers From Abusive Railroad Practices

This case presents the Court with a significant issue regarding the Interstate Commerce Commission's failure to comply with its Congressional mandate to regulate rail carriers when necessary to protect receivers from unlawful discriminatory practices.

In the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act), Pub. L. No. 94-210, 90 Stat. 31 (1976), and the Staggers Rail Act of 1980 (Staggers Act), Pub. L. No. 96-448, 94 Stat. 1895 (1980), Congress directed the ICC to reduce its supervision of the railroad industry so that market forces, rather than government regulation, controlled the level of carrier rates. However, Congress has authorized the Commission to "retain[] regulation where the market would be insufficient to protect shippers and the public from abusive railroad practices." Coal Exporters Ass'n of United States v. United States, 745 F.2d 76 (D.C. Cir. 1984).[5] Under 49 U.S.C. § 10505(d), the Commission

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[5] Reviewing the statutory scheme, the District of Columbia Circuit noted in Coal Exporters Ass'n, supra, "The Staggers Act exemption provision is an 'important cornerstone' of the overall statutory scheme in that it represents Congress' determination that there be continuing evaluation of the appropriateness of regulation and continuing deregulation where consistent with the Act's policies. H.R. Rep. No. 96-1035, 96th Cong. 2d Sess. 60

is obliged to revoke exemptions from regulation when "necessary" to carry out the national transportation railroad policy, which prohibits rail carriers from engaging in "unlawful discrimination." 49 U.S.C. § 10101a(13). Thus, notwithstanding a statutory scheme that encourages deregulation, both the courts and Congress have recognized the Commission's responsibility to revoke exemptions from regulation to protect receivers from abusive practices, including unlawful discrimination.[6]

The history of this case is one in which the Interstate Commerce Commission repeatedly ignored its responsibility to protect a captive set of receivers from an abusive and discriminatory surcharge. When the Commission, after nine years of litigation, finally provided Petitioners with a ruling on the merits, it did so (1) by overruling the well-reasoned decision of its Chief Administrative Law Judge with regard to Petitioners' claims of discrimination and (2) by disavowing jurisdiction over Petitioners' well-founded claims that Conrail's endorsement of false inspection reports constituted an unreasonable practice. In holding that

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(1980)." 745 F.2d at 82.

[6] "Congress itself envisioned after the fact review to correct isolated market abuses that may follow the lifting of protective regulations under section 10505(a). See [H.R. Rep. N. 1430, 96th Cong. 2d Sess. 79] at 105, 1980 U.S. Code Cong. & Admin. News at 4147 ("conferees expect . . . that the Commission will adopt a policy of reviewing carrier actions after the fact to correct abuses of market power.')." Brae Corp. v. United States, 740 F.2d 1023, 1043 (D.C. Cir. 1984), cert. denied, 471 U.S. 1069 (1985).

Conrail's surcharge did not unlawfully discriminate against Petitioners, both the Commission and the court of appeals overlooked the inevitable implication that the false inspection reports had for Petitioners' allegations of rate discrimination: Conrail was permitted to invoke its cost of litigating Petitioners' loss and damage claims in justifying the discriminatory surcharge even though the evidence established that Conrail endorsed slanted and false inspection reports and thereby escalated its own processing costs.

This Court should grant a writ of certiorari to clarify the Commission's obligation to regulate rail carriers to carry out Congress's national transportation policy. Before the promulgation of the Staggers Act and the onset of deregulation, the Commission's responsibility was clear: to set fair and non-discriminatory rates for the entire shipping industry. Under deregulation, the Commission has a different, though equally significant, obligation: to revoke exemptions from regulation granted to carriers that engage in unlawful and discriminatory charging practices. Thus, deregulation has not disturbed the ICC's responsibility to safeguard users of rail service; it has simply recast the manner in which the ICC must perform that function.

The Commission has repeatedly paid lip service to its responsibility to revoke regulatory exemptions when necessary to prevent rail carriers from engaging in unlawful discrimination. See, e.g., Ex Parte No. 346 (Sub-No. 14A) Rail General Exemption Authority -- Miscellaneous Agricultural Commodities -- Petition of G&T Terminal Packaging Co., Inc., et al. (April 17, 1989) ("If petitioners succeed in any of their litigation or prove here . . . that Conrail conspired to have loss and damage claims altered, and then based its increased charges on those claims, this

fact could support a finding of unlawfulness under the Interstate Commerce Act.") The Commission has given solemn assurances that it would not permit deregulation to operate to the detriment of receivers. Yet for more than ten years, the Commission has used the cover of deregulation to permit the imposition of an unlawful surcharge upon a group of receivers for the express purpose of discouraging them from filing loss and damage claims against a rail carrier.

The unfairness of the surcharge is highlighted by the fact that after more than ten years of litigation, no court or administrative body has determined that any of Petitioners' loss and damage claims against Conrail were unjustified. In fact, the Commission's Chief ALJ specifically found that "most of petitioners' claims are validated by payment." D112. Without disturbing this finding, the ICC simply assumed that Conrail is entitled to recoup its costs of processing because Petitioners file more claims than their competitors. This assumption turns the reality of the marketplace on its head. The fact that Petitioners file more undeniably legitimate claims than their competitors reflects Conrail's hold on the industry and its ability to intimidate other receivers from challenging Conrail's position in the deregulated market. D84. The surcharge penalizes Petitioners for standing up to this clear abuse of power.

In permitting Conrail to impose the surcharge upon Petitioners, the Interstate Commerce Commission has evaded its responsibility to monitor and act upon instances of unlawful rate discrimination. As one court has previously recognized, "Conrail's ability to drive up G&T's rates without fear of losing G&T's business to a competitor carrier is evidence of something amiss in the deregulatory scheme envisioned by Congress and the ICC. . . . [S]uch

irregularities were intended by Congress to be addressed and corrected by the ICC." G&T Terminal Packaging Co. v. Consolidated Rail Corp., 646 F. Supp. at 520 (emphasis added). The Commission's refusal, in the face of its statutory mandate, to protect receivers from Conrail's discriminatory tactics warrants review by this Court.

II. The ICC's Conclusion That The Surcharge Does Not Constitute Unlawful Rate Discrimination Is Not Supported By Substantial Evidence

To establish a prima facie case of unlawful rate discrimination, the complainant must show that the rail carrier imposes different rates for (1) "performing a like and contemporaneous service," (2) "in the transportation of a like kind of traffic," (3) "under substantially similar circumstances." 49 U.S.C. § 10741(a). A party alleging discrimination must demonstrate a prima facie case with respect to each of these elements, and further show that the disparity causes it a competitive injury, either actually or potentially. See Dresser Industries, Inc. v. ICC, 714 F.2d 588, 598 (5th Cir. 1983); Harborlite Corp. v. ICC, 613 F.2d 1088, 1090-91 (D.C. Cir. 1979); State of New York v. United States, 568 F.2d 887, 898 (2d Cir. 1977). Congress has limited claims of discrimination to rate disparities that occur over the same route; a disparity in rates that occurs over "different routes" does not constitute discrimination. 49 U.S.C. § 10741(f). Finally, a carrier can rebut a prima facie case of rate discrimination by showing that the disparity is occasioned by differences in transportation conditions.

In rejecting the ALJ's conclusion that Conrail's surcharge constituted unlawful discrimination, the Commission made three factual findings, none of which was

supported by substantial evidence, see 5 U.S.C. § 706(2) (1988), and all of which had been rejected by the ALJ. First, the ICC found that Kingsbridge, where Petitioners receive produce, was on a "different route" from Hunts Point, Mt. Kisco and Mt. Vernon, where its competitors were located. Second, the ICC held that no evidence supported the finding that the surcharge caused potential competitive injury to Petitioners. And third, the ICC speculated that Conrail's surcharge may have been justified by differences in transportation conditions on the theory that Conrail incurred special costs in resolving Petitioners' relatively high number of loss and damage claims. Each of these conclusions was erroneous and was not supported by substantial evidence.

A. The "Different Routes" Provision Is Inapplicable Because The Surcharge Applies Wherever Petitioners Receive Shipments From Conrail

The court of appeals agreed with the Commission that Petitioners' proof of the rate disparity caused by Conrail's surcharge did not "meet the 'same route' requirement of § 10741(f)," because Kingsbridge was on a "different line" from Hunts Point and other locations in the New York City area. Putting aside the question of whether Kingsbridge is on the "same route" as these other locations -- which it unquestionably is -- the "same route" requirement of section 10741(f) has no application to this case, and the Commission's reliance on this provision was a misapplication of the statute. The uncontradicted evidence showed that Petitioners also received produce at Hunts Point, where they have been surcharged in the same manner as at Kingsbridge and where other receivers have escaped the surcharge. C23.

Indeed, Conrail notified all western carriers that the surcharge was applicable to Petitioners' shipments to "any destinations on Conrail." D25. Thus, the particular route is irrelevant to Conrail's discriminatory scheme; Conrail has imposed the surcharge only on shipments to Petitioners at any destination at which Petitioners are located and conduct business.

Moreover, even if the surcharge applied only to Petitioners' shipments at Kingsbridge, the "separate routes" provision still would not justify overturning the ALJ's finding of rate discrimination. "The reason to except 'rail rates applicable to different routes' is that this contemplates a situation where costs are different." Seaboard Coast Line R.R. v. United States, 724 F.2d 1482, 1490 (11th Cir. 1984). The record unequivocally demonstrates that there is no appreciable difference between Conrail's costs of serving Kingsbridge and its costs of serving Hunts Point, Mt. Vernon, and Mt. Kisco.[7]

Prior to the imposition of the surcharge, Conrail charged a single published rate of $5,200 per car for delivery of Idaho potatoes to any location in "New York City," without regard to which "railroad line" the receiver's place of business was located. The New York City area

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[7] The ICC strained to make these nearby locations sound distant: "Mt. Kis[c]o lies far to the north in Westchester County, Hunts Point is on the East River in the Bronx, Mt. Vernon lies north of the Bronx, and Kingsbridge is on a different line to the south and east, directly north of Manhattan." C23. In reality, all locations are in the relatively contained New York City area.

included the separate destinations of Kingsbridge, Hunts Point, Mt. Vernon and Mt. Kisco. In December 1982, Conrail decided "to segment the markets more finely and price individual receiving markets to more closely reflect the actual cost of providing transportation." This effort, however, resulted only in surcharging Petitioners at Kingsbridge. Immediately after the imposition of the surcharge, the new published schedule showed a separate rate for Kingsbridge ($5,700, including the $500 surcharge); Hunts Point (still $5,200); and Mt. Kisco/Mt. Vernon ($5,240). C46. Thus, excluding the surcharge, these four destinations carried rates that varied from one another by less than one percent. The purported distinction in shipment costs was an obvious subterfuge to mask the surcharge directed at Petitioners, since they were the primary users of Kingsbridge at the time. See Harborlite Corp. v. ICC, 613 F.2d at 1100 ("It is insufficient for the carrier to show that transportation circumstances are not identical for the allegedly preferred and the allegedly prejudiced shipments, for the question is not whether any disparity is warranted. What the carrier must justify is the particular disparity existing in the case under consideration.").[8]

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[8] The legislative history of section 10741(f) recognizes that a geographic area, as distinguished from one particular shipping origin or destination, can provide the basis for defining a "route." The House Report explains that:

> [t]he new subsection (f) is intended to narrow the scope of section 10741 by exempting . . . rail rates applicable to different routes between the same end points . . . . The Committee considers 'end points' to mean

B. The Petitioners Demonstrated Competitive Injury From The Surcharge

The court of appeals also affirmed the Commission's decision to reject "the ALJ's finding that [the Petitioners] proved competitive injury resulting from the surcharge." The ICC observed that "[t]he $500-600 per car surcharge amounts to only about one-half cent per pound for potatoes, or one-fourth petitioners' markup in potato prices." C26 (emphasis added). In declining to find that Petitioners had suffered a potential competitive injury, the ICC misapplied the law and improperly held Petitioners to an unduly high burden.

To establish a claim of unlawful discrimination, the complainant must show only the existence of "actual or potential competitive injury." See State of New York v. United States, supra, 568 F.2d at 898 (emphasis added). The Commission failed to apply this standard. Without any factual support, the Commission criticized the ALJ's reliance on undisputed sales volume data which showed a precipitous drop in Petitioners' business after the imposition of the surcharge. Dismissing the significance of this data, the Commission stated that "[i]t is not clear that petitioners'

> specific origins and destinations and broad geographic areas encompassing origins and destinations contained within particular or general tariffs.

H.R. No. 96-1035, 1980 U.S. Code Cong. & Ad. News 3978, 4004-05 (emphasis added).

Idaho potato business suffered as much as petitioners claim, and in light of the increased sales of other western potatoes, it is doubtful that petitioners suffered the degree of injury they alleged, even if their Idaho sales declined." C25.

The ICC's speculation ("it is doubtful") holds Petitioners to an impermissibly high standard of proof, and should be rejected by this Court. See Harborlite Corp. v. ICC, 613 F.2d 1088, 1098 (D.C. Cir. 1979) (ICC's "statement that the effect on freight rates was 'uncertain,' even if accurate, is immaterial, for injury need not be proved to the point of certainty"). The law is well-established that Petitioners are not required to establish the precise level of competitive injury they suffered from the surcharge. Rather, Petitioners needed to show only that the surcharge caused it "potential competitive injury." See State of New York v. United States, supra, 568 F.2d at 898. Indeed, properly applying this standard, the ALJ did not require Petitioners to quantify the amount of their competitive injury. Satisfied that such competitive injury -- whether potential or actual -- resulted from the imposition of the surcharge, the ALJ left its calculation to future proceedings. D94.

Even apart from the drop in Petitioners' sales, the record plainly demonstrates the potential for competitive injury, and a finding to the contrary is not supported by substantial evidence. While the court of appeals observed that "[p]otential injury cannot be purely chimerical," it overlooked that the selective imposition of a surcharge upon a captive set of receivers, but not upon their competitors at the same or nearby locations, demonstrates that the potential injury is not "chimerical." By the ICC's own calculations, the surcharge, which increases Petitioners' rates by over 10%, devours "one-fourth of petitioners' markup in potato

prices." C26. In light of the fact that only Petitioners pay the surcharge for the shipment of western potatoes to the New York City area, the conclusion that the surcharge does not have the potential for competitive injury has no basis in the record.[9]

C. Conrail Failed to Establish That The Surcharge Was Justified By Differing Transportation Circumstances

Once a receiver has demonstrated the existence of a discriminatory rate disparity, it is the carrier that bears the burden of proving that the disparity is justified by differing transportation conditions. See State of New York v. United States, supra, 568 F.2d at 898 ("the carriers have the burden of justifying the disparity"). The ICC took the opposite approach, improperly saddling Petitioners with the burden of disproving Conrail's assertion that its surcharge was necessary to recoup its costs of resisting Petitioners' loss and damage claims. In relieving Conrail of its burden to justify the surcharge, the Commission (and the court of appeals) began their inquiry with the assumption that Petitioners were responsible for "generating" these costs.

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[9] The ICC sought to downplay the potential injury caused by the surcharge, intimating that G&T "apparently marks up its produce substantially." C26. This assertion, even if true, is irrelevant to the real issue: whether Petitioners were potentially harmed by the surcharge in relation to their competition. On this point, the ICC's own evaluation of the record is conclusive. The ICC expressly found that the surcharge alone represented 25% of Petitioners' markup on western potatoes. Id.

No evidence warranted this assumption. Not only has no court or administrative body determined that any of Petitioners' loss and damage claims were unjustified; to the contrary, the ALJ found:

> The evidence of record establishes that the claims activity of petitioners is justified. . . . Past history establishes that most of petitioners' claims are validated by payment.

D112.

Without challenging this finding, the ICC and the court of appeals simply took the position that Conrail was entitled to recoup its purported costs of processing these claims through a surcharge because Petitioners filed more claims than other produce receivers. C34. In the words of the Commission, "clearly loss and damage experience is, and has always been, a relevant consideration in ratemaking and rate classification generally." C29.

This general principle is misapplied in this case. The issue is not whether, as a general proposition, a rail carrier can rely on loss and damage experience in setting rates for broad commodity or territorial groups. See Railway Cost Recovery Procedures, 1 I.C.C.2d 207, 223-24 (1984); Fresh Meats from Midwest to East, 313 I.C.C. 345, 369 (1961); Investigation into Motor Carrier Classification, 367 I.C.C. 243 (1983). Rather, the issue is whether Conrail can impose on a single set of customer a surcharge based solely on its purported costs of processing those customers' loss and damage claims where Conrail unreasonably escalated many of those processing costs through its knowing endorsement of false and slanted inspection reports. As to this specific

question, the ICC, without pursuing the inquiry, conceded that "in a given case, a carrier's allocation of loss and damage expenses to a particular receiver might be found to be unreasonable." C30. In effect, without a determination of whether Conrail's validation of false inspection reports constituted an "unreasonable practice," an issue over which the Commission disclaimed jurisdiction, the court of appeals had no basis on which to assume that Conrail could properly impose a surcharge to recoup the costs it incurred in processing Petitioners' loss and damage claims.

CONCLUSION

For the foregoing reasons, Petitioners respectfully pray that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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MR. SPROUT, INC.; TRAY WRAP, INCORPORATED; COUNTRY WIDE PRODUCE, INCORPORATED; G & T TERMINAL PACKAGING CO., INC.,

Petitioners,

v.

UNITED STATES OF AMERICA, AND INTERSTATE COMMERCE COMMISSION,

Respondents,

CONSOLIDATED RAIL CORPORATION; ATCHISON, TOPEKA, AND SANTA FE RAILWAY COMPANY,

Intervenors.

Docket 92-4160

United States Court of Appeals,
Second Circuit

Decided Jan. 3, 1994

Before: KEARSE, CARDAMONE and PIERCE, Circuit Judges.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for Petitioners MR. SPROUT, INC., et al.,

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT,
GEORGE LANGE III, Clerk

By: /s/
Carolyn Clark Campbell
Chief Deputy Clerk

MR. SPROUT, INC.; TRAY WRAP, INCORPORATED; COUNTRY WIDE PRODUCE, INCORPORATED; G & T TERMINAL PACKAGING CO., INC., PETITIONERS,

v.

UNITED STATES OF AMERICA, AND INTERSTATE COMMERCE COMMISSION,

Respondents,

CONSOLIDATED RAIL CORPORATION; ATCHISON, TOPEKA, AND SANTA FE RAILWAY COMPANY,

Intervenors.

No. 959, Docket 92-4160

United States Court of Appeals,
Second Circuit

Argued Feb. 11, 1993

Decided Oct. 25, 1993

Before: KEARSE, CARDAMONE and PIERCE, Circuit Judges.

CARDAMONE, Circuit Judge:

This appeal concerns the shipment of potatoes by rail into the New York City metropolitan area. A group of shippers blame the railroad for the fact that an appreciable amount of this product is received in unsaleable condition. Because potatoes are plentiful and a relatively inexpensive vegetable, a good many consumers have a decided attachment to them so that the demand for this produce is large. Not only are potatoes good to put in the mouth to eat, but the word "potatoes" itself is also, so Dickens tells us, like papa, prunes and prism--a "very good word[ ] for the lips." Charles Dickens, *Little Dorrit (Part Two), in 8 The Works of Charles Dickens* 67 (Collier & Son ed. 1900).

However good in whatever way potatoes may be for the lips, the shipment of these vegetables has not proved in this case to be good for anyone's pocketbook. For over a decade the shippers have mounted such an intensive barrage of lawsuits and administrative proceedings against the railroad for damages on account of claimed spoilage that the railroad has imposed a surcharge on every shipment of potatoes destined for these particular shippers to cover its litigation expenses. This costly legal warfare culminated in a ruling by the Interstate Commerce Commission (ICC or Commission) in July 1992, from which this appeal has been taken, upholding the surcharge and further ruling that it lacked jurisdiction over the practices of the agencies charged

with inspecting railroad cars for alleged spoilage to produce en route to shippers.

BACKGROUND and PRIOR PROCEEDINGS

G & T Terminal Packaging Co., Mr. Sprout, Inc., Tray Wrap, Inc., and Country Wide Produce, Inc. (collectively petitioners, wholesalers, shippers, or G & T) are closely related produce wholesalers located at Kingsbridge, Bronx, New York. G & T, Mr. Sprout, and Tray Wrap are owned or directly controlled by one Anthony Spinale, and Country Wide is owned by Gary Speier, an employee of G & T and Tray Wrap. These potato wholesalers receive their product via the Consolidated Rail Corporation (Conrail), which carries potatoes grown in the western states to the east coast and into the wholesaler's Kingsbridge facilities. There the potatoes are repackaged for consumers and sold to retailers in the New York City metropolitan market. Conrail is the last link in a rail carrier chain of railroads transporting this produce.

G & T and Conrail have had an acrimonious history. According to Conrail, petitioners in the early 1980s filed loss and damage claims--which compensate a receiver for economic losses from shipment delays or produce spoilage, *see* 49 U.S.C. § 11707(a)(1) (1988)--on nearly every carload of produce shipped to them. Conrail claims that the damages sought--$4.2 million in a pending lawsuit in the United States District Court for the Southern District of New

York--are higher than those of all the other produce shippers served by the railroad combined. The ICC reports that historically about 6 percent of G & T's damage claims are paid. In addition to damage suits against Conrail, G & T has withheld payment on "demurrage and detention" charges which compensate the railroad for extra time the wholesaler takes in unloading the railcars.

As a response to all this claims activity, Conrail in May 1983 imposed a surcharge of over $500 on every railcar destined to the wholesalers' Kingsbridge facilities. This surcharge raised the shippers' cost of transporting a carload of potatoes from Idaho to the Bronx to $5,800. Conrail insists the surcharge merely covers the extra cost of defending against petitioners' damage claims. When G & T began receiving potato shipments in its nearby Hunts Point facility, Conrail imposed the same surcharge on the wholesaler at that location as well.

As a result of the surcharge petitioners filed suit against Conrail in March 1984 in New Jersey district court seeking to revoke the exemption from ICC regulation of the shipment of potatoes by rail. G & T says it went to court in reliance on an October 1983 letter from the ICC in which the Director of the Office of Proceedings stated that his agency no longer had jurisdiction over rate disputes with the deregulated railroads. In March 1986 the ICC formally reversed this position and asserted that it had exclusive jurisdiction where the challenged rates had been deregulated

under 49 U.S.C. § 10505 (1988). The ICC's position was upheld by the Third Circuit and petitioners' common law claims against Conrail were dismissed. *See G. & T. Terminal Packaging Co. v. Consolidated Rail Corp.*, 830 F.2d 1230, 1233-36 (3d Cir.1987) (G & T I), *cert. denied*, 485 U.S. 988, 108 S.Ct. 1291, 99 L.Ed.2d 501 (1988). The Third Circuit also held that the $500 plus surcharge did not violate the Interstate Commerce Act because a railroad could take the cost of damage claims into account when it set rail rates, *id.*, at 1233, and dismissed G & T's constitutional due process claims because Conrail is not a state actor. *Id.*, at 1236.

In addition to its dispute with Conrail over the surcharge and its many damage claims, the shippers contend that Conrail's inspection reports documenting the condition of produce upon arrival in New York are fraudulent. The challenged reports are prepared by several agencies--the Transportation Inspection Agency, Inc. (TIA) (formerly Railroad Perishable Inspection Agency or RPIA), and the Merchants Dispatch Transportation Corporation (MDT). MDT is a wholly-owned subsidiary of Conrail and TIA is controlled by a railroad association of which Conrail is a member. The wholesalers insist the agencies prepare false inspection reports because Conrail has instructed them to remove all language imputing blame to the railroad. Conrail points out that the inspectors are not employed to give their opinion as to blame, but simply to document facts, such as the temperature in a railcar and apparent produce spoilage.

G & T has lost all of its several lawsuits on this issue in state and federal courts, and in *G & T Terminal Packaging Co. v. Consolidated Rail Corp.*, 719 F.Supp. 153, 155-57 (S.D.N.Y.1989) (G & T II), the district court dismissed petitioners' fraud claims on the grounds of res judicata and collateral estoppel.

The shippers filed a petition with the ICC against Conrail in July 1988 to reregulate the railroad's Kingsbridge and Hunts Point traffic. The complaint was amended a year later to add the Atchison, Topeka, and Santa Fe Railway Company, which ships russet potatoes from California. The amended claim raises issues identical to those against Conrail. In February 1991 an Administrative Law Judge (ALJ), acting for the ICC, recommended reregulation under 49 U.S.C. § 10505(d) (1988). The ALJ found that Conrail discriminated in its rating practices and had imposed its railcar surcharge to discourage the shippers from exercising their right to file damage claims. The ALJ also found that Conrail engaged in unreasonable practices in violation of 49 U.S.C. § 10701(a) (1988) by endorsing the disputed inspection reports.

On appeal, the Commission reversed the ALJ in an order and opinion entered July 24, 1992. The ICC held that Conrail did not have market power over these shippers, which is a prerequisite for reregulation. It also held that Conrail's surcharge was legitimate and that the shippers had failed to present a prima facie rate discrimination case under

49 U.S.C. § 10741 (1988). The ICC ruled it lacked "unreasonable practice jurisdiction" over the inspection agencies. It is from this order that petitioners appeal.

REGULATORY BACKGROUND

In the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act), Pub.L. No. 94-210, 90 Stat. 31 (1976), and the Staggers Rail Act of 1980 (Staggers Act), Pub.L. No. 96-448, 94 Stat. 1895 (1980), Congress directed the ICC to reduce its supervision of the railroad industry so that carrier rates and practices would be disciplined by market forces rather than government regulation. With these statutes, Congress gave the ICC authority to exempt categories of rail traffic from regulation where

> (1) [it] is not necessary to carry out the transportation policy of section 10101a of this title; and
>
> (2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.

49 U.S.C. § 10505(a) (1988). Pursuant to that directive, the Commission exempted the movement of potatoes by rail from regulation in April 1980.

Once the ICC has decided to exempt a rail carrier from regulation, it retains the power to revoke that exemption, or reregulate the railroad, under 49 U.S.C. § 10505(d). The standards for revocation proceedings are set forth in § 10101a, which identifies the government's policy goals with respect to the nation's railroads, such as fair and competitive pricing, safety and minimal regulation. *Id.* § 10101a. G & T's petition before the ICC was a request under § 10505(d) to reregulate Conrail's potato traffic.

On appeal petitioners raise three issues: (1) was the finding by the ICC that Conrail lacked market power correct; (2) was Conrail's surcharge discriminatory; (3) did the ICC have jurisdiction over the claim that the rail inspection reports constituted an unreasonable practice by Conrail. Following petitioners' lead, we recognize that the first two issues apply equally to Santa Fe, though the factual circumstances differ slightly. Our resolution of these issues therefore embraces Santa Fe as well as Conrail.

DISCUSSION

I Standards of Review

Before undertaking an analysis of the merits, we comment briefly on issues of jurisdiction and our scope of review. The ICC has jurisdiction over a proceeding that seeks to revoke an exemption from its regulation of rail

carrier transportation according to 49 U.S.C. § 10505(d) (1988). We have appellate jurisdiction over the ICC's final order denying petitioners' application for reregulation under 28 U.S.C. § 2342(5) (1988). The ICC order, which disposed of all claims with respect to all parties, became final when entered on July 24, 1992. 49 U.S.C. § 10327(i) (1988). On September 18, 1992 the shippers filed a timely petition for review. *See* 28 U.S.C. § 2344 (1988). Because the shippers have their principal offices in New York State, venue is proper in this Circuit pursuant to 28 U.S.C. § 2343 (1988).

The Commission's interpretation and application of the exemption provision that it administers is entitled to the same deferential standard of review as that afforded to other agency proceedings. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45, 104 S.Ct. 2778, 2781-83, 81 L.Ed.2d 694 (1984); *Central States Motor Freight Bureau, Inc. v. ICC*, 924 F.2d 1099, 1102 (D.C.Cir.), *cert. denied*, --- U.S. ----, 112 S.Ct. 87, 116 L.Ed.2d 59 (1991); *Niagara Frontier Tariff Bureau, Inc. v. United States*, 826 F.2d 1186, 1190-91 (2d Cir.1987); *Brae Corp. v. United States*, 740 F.2d 1023, 1038-39 (D.C.Cir.1984), *cert. denied*, 471 U.S. 1069, 105 S.Ct. 2149, 85 L.Ed.2d 505 (1985). Under the Administrative Procedure Act, 5 U.S.C. § 706(2) (1988) (APA), we may reverse the Commission's decision only if it is not supported by substantial evidence or is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *See*

Connecticut Trust for Historic Preservation v. ICC, 841 F.2d 479, 481-82 (2d Cir.1988). The fact that the ICC's decision reversed an ALJ's ruling does not alter the deference standard. *See Marshall Durbin Food Corp. v. ICC*, 959 F.2d 915, 920-21 (11th Cir.1992). Rather, under the APA, all issues raised by a party's administrative appeal of an ALJ's initial decision are considered de novo by the Commission, *see* 5 U.S.C. § 557(b) (1988); *see also Containerfreight Transp. Co. v. ICC*, 651 F.2d 668, 670 (9th Cir.1981) (*per curiam*), and our review is directed at the final conclusion of the Commission itself.

II Market Power

With that discussion of threshold matters, we turn to an analysis of the three issues before us. The Commission properly found the initial inquiry in a reregulation case is whether the carrier has market power. Conrail delivers russet potatoes originating in various states, including Idaho. It is the only rail carrier delivering Idaho potatoes into New York City. Santa Fe, by contrast, originates shipments of russet potatoes in western states other than Idaho. Conrail noted that it faced competition from truckers delivering russets from states such as Maine and Michigan. The shippers sought to demonstrate Conrail's market power by showing that the Idaho russet potato is unique, and that hence (at least as to Idahos) it was irrelevant whether other russet potatoes can be trucked to New York from Maine and Michigan.

On the basis of interviews with buyers at various retail grocery chains, including A & P, Wakefern and Grand Union, a Conrail witness testified that Idaho russets were generally interchangeable with other types of russets. By contrast, a wholesaler witness stated that in his experience Idaho russets are unique and that--at least as to the Idaho potatoes that were surcharged--Conrail had market power. The Commission recognized that questions such as product substitutability and transportation alternatives were relevant in assessing the rail carriers' market power, but it focused instead on a third criterion that the ALJ had ignored--Conrail's rates--to see if the carrier's pricing behavior was that of a business with market power.

The Commission concluded that Conrail's pricing patterns revealed a lack of substantial market power. It arrived at this result by reviewing Conrail's 1990 cost study, which it found thorough, reasonable and essentially unrebutted. That study showed, inter alia, that under a scenario most favorable to the wholesalers--including revenues from the surcharge while excluding legal costs and the cost of paid damage claims--Conrail's revenues on petitioners' potato traffic exceeded its variable costs by no more than 17 percent in 1987 and 13 percent in 1988. The Commission also considered Conrail's undisputed evidence that even with the surcharge, the inflation-adjusted rail rate paid by the shippers actually decreased 24 percent while the exemption was in effect. These figures, concluded the Commission, "indicate [ ] a very competitive market for all

western potatoes, regardless of whether or not Idaho potatoes represent a unique market."

Petitioners do not now seriously challenge the validity of the evidence on which the Commission based its conclusion. Instead, they raise three arguments regarding the Commission's rulings: (1) its use of low revenue-to-variable cost ratios to establish a lack of market power was inappropriate and contrary to precedent; (2) it did not explain why the "profits" Conrail earned are inadequate; and (3) its reliance on "theoretical" indicia of market power such as revenue-to-cost calculations is contrary to *Eastman Kodak Co. v. Image Technical Servs., Inc.*, --- U.S. ----, ----, 112 S.Ct. 2072, 2082, 119 L.Ed.2d 265 (1992). We address each of these arguments in turn.

First, revenue-to-cost ratios have been employed by the Commission, the courts, and Congress as a valid and reliable measure of market power in the rail industry. In *Rail General Exemption Authority-Lumber or Wood Products*, 7 I.C.C.2d 673, 676 (1991), for example, the ICC exempted from regulation rail transportation of various lumber and wood products. It did so after finding that the rail carrier lacked market power to warrant regulation, a determination that was based in part on the low revenue-to-variable cost ratios and the declining earnings for carriers in this area. Similarly in *Exemption from Regulation-Boxcar Traffic*, 367 I.C.C. 424, 435-440 (1983), the Commission relied on low revenue-to-variable cost ratios as a factor to establish the

absence of market power in granting the boxcar exemption in the first place. The Commission's decision in this case--and indirectly its use of cost and revenue ratios--was affirmed in relevant part by the D.C. Circuit in *Brae Corp.*, 740 F.2d at 1037, 1042-43. *See also Coal Exporters Assn. v. United States*, 745 F.2d 76, 96-97 (D.C.Cir.1984), *cert. denied*, 471 U.S. 1072, 105 S.Ct. 2151, 85 L.Ed.2d 507 (1985).

Congress itself has recognized that revenue-to-variable cost ratios can be indicative of market power. In the 4-R Act and the Staggers Act Congress provided that maximum rate regulation by the Commission is inappropriate except to the extent that a carrier has "market dominance" over the traffic at issue. 49 U.S.C. § 10701a(b)(1) (1988). Market dominance, defined in § 10709(a) as "an absence of effective competition from other carriers or modes of transportation for the transportation to which a rate applies," is a form of market power. Congress expressly provided that ratios of revenue-to-variable costs in the range from 160 to 180 percent, depending on the rate's time span, are acceptable and do not indicate market dominance. *See id.* § 10709(d)(2). Employing this statute as a general guideline, we are satisfied that the ICC's use of Conrail's 117 percent ratio as one compelling sign of the carrier's lack of market power was neither unwarranted, nor arbitrary and capricious under APA § 706. *See* 5 U.S.C. § 706(2) (1988).

Petitioners make the further argument that, even if the Commission was within its discretion in relying on cost ratios as one factor in the market power analysis, the Commission abused its discretion in relying on such ratios as the "threshold question." We disagree. While we believe that other more "subjective" factors are often important in market power determinations, *see, e.g., International Distribution Ctrs., Inc. v. Walsh Trucking Co.*, 812 F.2d 786, 792 (2d Cir.) (in antitrust context, listing factors relevant to market power inquiry), *cert. denied*, 482 U.S. 915, 107 S.Ct. 3188, 96 L.Ed.2d 676 (1987), with respect to an analysis of market power in the railroad industry, we decline to hold that the ICC abused its discretion in using cost ratios in its threshold inquiry.

As to petitioners' second point, in the rail industry, rates barely returning variable costs tend to indicate a competitive, not a captive, market. The rail industry is characterized by heavy fixed costs, *see Coal Rate Guidelines, Nationwide*, 1 I.C.C.2d 520, 529 (1985), *aff'd sub nom. Consolidated Rail Corp. v. United States*, 812 F.2d 1444 (3d Cir.1987), and the Commission has calculated, in the context of limiting rates on recyclables, that the average revenue-to-variable cost level that would permit the industry as a whole to recover its fully allocated costs, including its cost of capital, range from 140 to 160 percent. For the most part the ratio is about 146 percent. *See CSX Transp., Inc. v. ICC*, 952 F.2d 500, 502 (D.C.Cir.1992).

But because of competitive constraints, a good deal of traffic is lost by the railroads to the trucking and maritime shipping industries at those levels. Accordingly, Congress in the Staggers Act recognized that railroads must engage in "differential pricing." Such pricing involves charging above fully allocated costs for captive traffic in order to be able to continue carrying competitive traffic at levels much closer to variable costs. *See* H.R.Rep. No. 1035, 96th Cong., 2d Sess. 39 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3978, 3984-85; *see also* S.Rep. No. 470, 96th Cong., 1st Sess. 7 (1980). Railroads must charge above fully allocated costs on captive traffic if they are to achieve revenue adequacy and stay in business. *See Potomac Elec. Power Co. v. ICC*, 744 F.2d 185, 193 (D.C.Cir.1984).

In this context, petitioners' assertion that the Commission did not explain why 13 and 17 percent are not reasonable "profit" margins misses the point. Rates returning 13 to 17 percent above variable costs are not really profits, for they do not fully cover costs. Given that fact, the Commission acted rationally in finding a lack of market power where revenues barely cover variable costs. No further explanations of the inadequacy of the rail carrier's profits were necessary.

Third, petitioners declare the Commission's reliance on carrier pricing behavior to determine market power is inconsistent with *Eastman Kodak Co.*, --- U.S. at ----, 112 S.Ct. at 2072, a 1992 Sherman Act case involving an alleged

tying arrangement. In that case, Kodak was denied summary judgment when it relied purely on an economic theory, and not on actual market data, for the proposition that a lack of market power over equipment sales in the primary market demonstrated a lack of market power over replacement parts sales in the tied market. The Supreme Court ruled that under those circumstances, summary judgment on the sole basis of an economic theory was inappropriate:

> "[C]ontrary to Kodak's assertion, there is no immutable physical law--no 'basic economic reality'--insisting that competition in the equipment market cannot coexist with market power in the aftermarkets." *Id.*, at ----, 112 S.Ct. at 2084. *Eastman Kodak* is plainly inapposite to this case; cost-revenue ratios are not based on theories of interrelationships between two markets but on factual data. Thus, contrary to petitioners' claim, the ICC did not substitute economic theory for economic reality. Rather, the Commission, after extensive factfinding, relied on Conrail's persuasive cost data, which was the most concrete and least theoretical evidence of market power presented. We cannot conclude that was arbitrary, capricious or in contravention of the law.

III Discrimination

To provide an independent basis for reregulation, petitioners declare the Commission should have found that Conrail's surcharge was unreasonably discriminatory. "Unreasonable discrimination" occurs when a railroad exacts different rates for (1) "performing a like and contemporaneous service," (2) "in the transportation of a like kind of traffic," (3) "under substantially similar circumstances." 49 U.S.C. § 10741(a) (1988). A party alleging discrimination must demonstrate that each of these elements is satisfied, and that the rate disparity causes it to suffer a competitive disadvantage. In addition, discrimination cannot exist between different routes. See § 10741(f). Finally, a challenging party must rebut any showing by the carrier that the disparity is occasioned by differences in transportation conditions, including the cost of providing service. *See Dresser Indus. v. ICC*, 714 F.2d 588, 598 (5th Cir.1983); *Nueces County Navigation Dist. No. 1 v. ICC*, 674 F.2d 1055, 1060 (5th Cir.), cert. denied, 459 U.S. 1035, 103 S.Ct. 446, 74 L.Ed.2d 601 (1982); *Harborlite Corp. v. ICC*, 613 F.2d 1088, 1091-92 (D.C.Cir.1979). The shippers failed to present a prima facie case of discrimination under § 10741, and even if they had, we believe the Commission's finding that any rate difference was warranted by the varying transportation conditions was justified.

Petitioners submitted no evidence about who their competitors are, which rail lines their competitors are on, what their competitors sell and which markets they serve, what carriers their competitors use, or what rates their competitors paid. Nor did the wholesalers present any evidence that the sales to retailers they served suffered because their rates prejudiced them vis-a-vis competitors. Hence, petitioners did not make out a prima facie case.

A. *Competitive Injury*

We address first the statutory elements of rate discrimination. The shippers insist they identified their competitors before the Commission as three potato repackers at Hunts Point Market: Fierman Produce, Havana Potatoes, and Jacobson Potatoes. But the names of these businesses appeared only in response to interrogatories filed by Conrail asking what produce dealers petitioners were aware of at various locations. The way in which these competitors affected petitioners' business was not offered as part of petitioners' proof, nor did petitioners demonstrate that they compete with these companies to provide potatoes (Idahos or other russets) to particular retailers. Without this information the Commission was unable to make a finding that the same carriers served the unnamed competitors or that an alleged rate differential caused competitive harm to the subject shippers.

G & T further posited that competitive harm can be deduced from a drop in rail shipments from 1983--when the surcharge was imposed--to 1984, but the Commission noted that rail shipments of potatoes were unusually high in 1983 and returned to historic levels in 1984. In fact, the Commission found potato deliveries in the last part of 1983 and first half of 1984 to be "well above" 1982 levels. Moreover, the ICC found no competitive injury even if rail shipments did drop, inasmuch as five of G & T's seven largest customers, representing 83 percent of its total business, bought more potatoes from petitioners in 1984 than in either 1983 or 1982. Regardless of where petitioners obtained their potatoes, or the delivered price they paid for them, their business apparently did not suffer, and accordingly, especially in light of their failure to show what rates their competitors paid the Commission's finding that petitioners did not show competitive harm as required by 49 U.S.C. § 10741(f) (1988) was not arbitrary or capricious.

G & T next argues that the Commission erred because it did not recognize that only "potential" for competitive injury need be shown. *Cf. State of N.Y. v. United States*, 568 F.2d 887, 898 (2d Cir.1977); *Harborlite Corp.*, 613 F.2d at 1091. The ICC, contrary to petitioners' contention, did not suggest that G & T had to prove a precise level of competitive harm. But given the dearth of evidence, the ICC had no basis for finding potential injury to the wholesalers. Potential injury cannot be purely chimerical; rather, it must be grounded in facts indicating

a real possibility of competitive harm. No such facts have been advanced.

B. *No Unlawful Discrimination Between Rates Applicable Over Different Routes*

Concerned that even the legislative hurdles of showing different rates for a like service under similar circumstances would be insufficient to prevent shippers from disputing justified rate differentials, Congress in 1980 said that § 10741(a)'s prohibition against unlawful discrimination "shall not apply" to "rail rates applicable to different routes." 49 U.S.C. § 10741(f)(4) (1988); *see also* H.R.Rep. No. 1430, 96th Cong., 2d Sess. 104 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4110, 4136. The ICC summarized the record on this point succinctly:

> [P]etitioners ... indicate that their primary point of receipt was at Kingsbridge, while the rates that they seemed to complain about applied to other points in the New York City area, such as Hunts Point, Mt. Kisco, and Mt. Vernon.... [H]owever, ... these four points are separate destinations located on different rail lines. Mt. Kisco lies far to the north in Westchester County, Hunts Point is ... in the Bronx, Mt. Vernon lies north of the Bronx, and Kingsbridge is on a different line....

Hence, the Commission properly found that petitioners did not meet the "same route" requirements of § 10741(f).

C. *Rate Differential as a Reflection of Costs*

The law has been settled for nearly a century that if it costs more to serve one customer than another, the statutory requirement of "substantially similar circumstances" is not met. It also is settled that rail carriers may consider their loss and damage experience in calculating those costs, that is, a carrier is not prohibited by § 11707 from taking those costs into account when it fixes its rates. *See G & T I*, 830 F.2d at 1233.

Even had petitioners made out a *prima facie* case, their discrimination claim would fail because Conrail's unrebutted cost study shows that the additional cost of serving G & T justifies any rate disparity that may exist. The shippers conceded that Conrail's freight handling practices are the same for them as they are for other potato shippers, and that the damage their freight suffers is neither more nor less than the damage suffered by Conrail's other potato receivers.

G & T does not directly dispute the basic legal proposition that loss and damage experience is a relevant consideration in carrier ratemaking. *See* 49 U.S.C. § 10505(e) (1988); *G & T I*, 830 F.2d at 1233. Rather,

taking the posture that the damage claims they make are valid, the shippers aver that allowing Conrail to reflect costs of these loss and damage claims in the rates punishes them for their special vigilance in standing up for their rights and would intimidate other shippers so that they will be afraid to exercise their rights. This view is simply another version of the argument--which has been rejected by other courts, *see G & T I*, 830 F.2d at 1233; *G & T Terminal Packaging Co. v. Consolidated Rail Corp.*, 646 F.Supp. 511, 520 (D.N.J.1986)--that Conrail's surcharge deprives the wholesalers of their statutory right to file claims. We see no reason to depart from the prior cases to adopt the shippers' position.

The shippers further suggest that Conrail be required to spread the loss and damage costs occasioned by its traffic among the other shippers it serves. But the Staggers Act, with its emphasis on allowing rail carriers the flexibility to price their services based on their costs and competitive considerations, discourages cross-subsidization among shippers. *See* 49 U.S.C. § 10101a (1988) (rail transportation policy). And, as the Commission noted, railroad accounting principles generally provide that costs should be recovered from the party that generates them. The cost averaging approach that petitioners advocate would relieve them of the responsibility for the costs they generate by shifting those costs to the traffic of shippers that handle their claims practices in a different manner. This would not only

unfairly penalize those shippers, but also hinder the ability of the railroads to offer them competitive rates.

IV ICC Jurisdiction Over Unreasonable Practices

A. *Parties' Contentions*

G & T's final argument for reversal is predicated on its belief that the ICC should exercise its "unreasonable practice" jurisdiction to remedy Conrail's endorsing of slanted inspection reports. The shipper says the ICC should have affirmed the ALJ's finding that Conrail's continued use (and alleged endorsement) of what it knew to be a fraudulent practice by TIA and MDT constituted an "unreasonable practice" within the meaning of 49 U.S.C. § 10701(a) (1988). The Commission conceded that petitioners presented evidence that the inspection agencies slanted reports in the railroad's favor. A number of inspectors testified that reports often had to be rewritten using certain terminology improperly shifting blame for damage away from the railroad, because "the railroad wants it done this way." Petitioners frequently called Conrail's attention to what the inspectors were doing. Yet, the ICC ruled that its jurisdiction to remedy "unreasonable practices" by a railroad did not extend to freight inspections. It reasoned that it would be stretching its jurisdiction to say that, because Conrail may have known about the inspection agencies' reporting practices, it committed an unreasonable practice by

adding to the cost of the inspection process or by raising its rates.

Conrail's response to petitioners' assertion of Commission jurisdiction is that the ICC always has recognized that it has no jurisdiction to adjudicate loss and damage claims, whether framed as fraud claims or otherwise. *See Ex Parte No. 263: Rules, Regulations, and Practices of Regulated Carriers with Respect to the Processing of Loss and Damage Claims*, 340 I.C.C. 515, 539-40 (1972) (*Loss and Damage Claims*). It concedes the ICC has authority to issue rules governing the efficient processing of loss and damage claims and that the agency has done so, *see* 49 C.F.R. § 1005.1 (1992), but Conrail argues that the petitioners do not claim that it has violated any of those rules. Further, Conrail continues, G & T's damage claims have been adjudicated in three separate court actions it brought asserting that TIA and MDT had forced their inspectors to structure or rewrite their inspection reports in an effort fraudulently to reduce Conrail's legal obligations to pay any freight loss and damage claims. But the courts found the wholesalers were unable to point to a single illustration of impropriety or to any particular report that had been fraudulently altered.

Conrail notes that for 50 years TIA has acted as agent for virtually all of the nation's railroads in inspecting perishables for loss and damage. The inspections performed by TIA are for the exclusive benefit of its railroad carrier

principals. Thus, reports are limited to the facts, and Conrail asserts that they may not include unwarranted and unintended admissions of liability. MDT's job is to inspect and repair the refrigeration units of railcars used for perishables, as agent for Conrail and other railroads. It performs mechanical duties only, and its inspectors are not authorized to make any assessments of damaged lading.

The ICC rightly noted, Conrail avers, that petitioners did not even claim, much less demonstrate, that they had relied on a railroad inspection report to their detriment. The shippers appear to concede that they were not misled by the inspection reports. Conrail did not make the inspection reports the sole basis for determining liability, as the ICC noted.

Conrail's argument concludes that even if the traffic were regulated and the ICC had found an "unreasonable practice," that finding could not have had any impact on Conrail's rates because the Act expressly forbids the ICC to use a finding of an unreasonable practice to limit "directly or indirectly" a rail carrier's rates. *See* 49 U.S.C. § 10707a(h) (1988). Thus, it believes the ICC's ultimate conclusion--refusing to revoke the exemption on the basis of unreasonable practices with respect to the inspection agencies--was amply supported by the record.

B. *ICC Ruling on this Issue*

When this issue was presented to the Commission it concluded when rates have not been shown to be unlawful, it may not use its "unreasonable practice" authority as an indirect means of limiting rates that carriers are otherwise authorized to charge under the statute. *See* 49 U.S.C. § 10707a(h) (1988). It reasoned that it may not interfere with a rail carrier's ratemaking discretion unless a carrier's rates or practices violate a particular provision of the Act, 49 U.S.C. § 10701a (1988). And, in § 10505(e), Congress directed that the ICC may not use the requirements of 49 U.S.C. § 11707 (1988), pertaining to loss and damage, as grounds for requiring carriers to maintain a particular rate level. In rejecting the ALJ's ruling in this respect, the ICC stated: "The type of activity here, freight inspections, is not a rate or tariff practice that the Commission has traditionally considered in the context of our unreasonable practice jurisdiction." The Commission accordingly ruled that its "unreasonable practice" jurisdiction did not extend to inspection activities.

C. *Analysis of ICC's Ruling*

We think the claims inspection practices of carriers fit well within the ICC's longstanding interpretation of its jurisdiction to regulate claims processing. In *Loss and Damage Claims*, 340 I.C.C. at 540-43, the agency established the extent of its "unreasonable practice"

jurisdiction with regard to matters relating to loss and damage claims against regulated carriers. There the ICC said:

> We have the undoubted authority to insure that regulated carriers establish reasonable regulations and practices related to their transportation services. It necessarily must follow that we have the jurisdiction and the power to establish regulations pertaining to the processing of loss and damage claims, even though no such authority may be specified in the act, if the processing of loss and damage claims is included in those transportation services concerning which carriers have an affirmative duty, under the statute, to establish reasonable regulations and practices. The same result logically must ensue if we find, upon a proper record, that the efficient and expeditious processing of loss and damage claims will further our implementation and effectuation of the national transportation policy.

Id. at 543.

This rationale remains compelling. In *Loss and Damage Claims* the ICC relied on the fact that carriers' reasonable practices for processing claims furthered two

aspects of national transportation policy: promoting an efficient transportation system and preventing discrimination. *See* 340 I.C.C. at 530 n. 9. These same two goals are at least equally as critical today, as evidenced by their enactment as part of the National Rail Transportation Policy. *See* 49 § 10101a(10) (1988) (policy "to encourage honest and efficient management of railroads"); *id.* § 10101a(13) (policy "to prohibit ... unlawful discrimination"). Further, *Loss and Damage Claims* establishes the ICC's authority to promulgate regulations regarding carrier's procedures for processing loss and damage claims. *See* 340 I.C.C. at 543 ("we have the jurisdiction and the power to establish regulations pertaining to the processing of loss and damage claims"). In particular, the ICC emphasized the need to regulate the investigation of such claims. *See id.* at 544-45. In accordance with this decision the ICC has, in fact, issued regulations that prescribe principles and practices for investigation and voluntary disposition of loss and damage claims. *See* 49 C.F.R. Part 1005 (1992).

[10] When the Commission departs from its own settled precedent, as here, it must present a "reasoned analysis" that justifies its change of interpretation so as to permit judicial review of its new policies. *See Rust v. Sullivan*, 500 U.S. 173, ----, 111 S.Ct. 1759, 1769, 114 L.Ed.2d 233 (1991). The reviewing court must be able to understand the basis of the agency's action so that it may judge the consistency of that action with the agency's mandate. *See Atchison, Topeka & Santa Fe Ry. Co. v.*

Wichita Bd. of Trade, 412 U.S. 800, 808, 93 S.Ct. 2367, 2375, 37 L.Ed.2d 350 (1973) (Marshall, J.). That new interpretation--once explained with reasoned analysis--is still entitled to deference under the standard of *Chevron*. *See Rust*, 500 U.S. at ----, 111 S.Ct. at 1769.

[11] The ICC's attempts to explain its disavowal of jurisdiction do not meet this standard. The Commission commences with the unfounded assertion that various provisions of the Interstate Commerce Act would have prevented it from granting an effective remedy even had it exercised jurisdiction. It insists that 49 U.S.C. §§ 10505(e) and 11707 (1988) somehow limit its revocation authority with respect to freight claim practices. We think this an arbitrary view because in the past the ICC has expressly rejected the notion that these carrier liability provisions of the Staggers Act diminish its authority to revoke regulatory exemptions. For example, in 1981 the Commission noted:

> If concrete problems arise with respect to carrier loss and damage practices, we would, of course, accept petitions to amend in an appropriate manner the exemption given [trailer on flat car and container of flat car] traffic. Because 49 U.S.C. § 10505(d) explicitly also grants us the authority to revoke an exemption in whole or in part, we can and will protect the legitimate interests of shippers, carriers, and the public in general.

Ex Parte No. 230 (Sub No. 5), 46 Fed.Reg. 32,257 (1981). The reason for the divergence from this past position is not articulated.

The ICC held that it had no jurisdiction to resolve this claim because the inspection reports are used as substantive evidence to decide damage claims, and damage claims are within the courts' jurisdiction. Putting aside the substance of the reports and the merits of damage claims, the ICC has jurisdiction over the way in which damage claims are made, and inspection reports clearly are relevant to a damage claim. Petitioners contend the reports are fraudulent because Conrail instructed their authors not to report on the cause of freight damage. Thus, such a claim deals with inspection report preparation and procedure, an area where the ICC has jurisdiction to decide whether Conrail's conduct is an unreasonable practice. On remand, the ICC must exercise its jurisdiction and resolve the issue of whether the inspection reports are fraudulent. What remedy the Commission imposes, were it to so find, is a matter confided to that agency's discretion.

CONCLUSION

Petitioners' appeal from the ICC order is accordingly affirmed, in part, and reversed, in part, and remanded to the Commission for further proceedings consistent with this opinion.

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EX PARTE NO. 346 (SUB-NO. 14A)

RAIL GENERAL EXEMPTION AUTHORITY -- MISCELLANEOUS AGRICULTURAL COMMODITIES -- PETITION OF G. & T. TERMINAL PACKAGING CO., INC., ET AL. TO REVOKE CONRAIL EXEMPTION

Decided July 16, 1992

The Commission reverses an initial decision revoking in part the exemption from regulation for rail transportation of western potatoes by Consolidated Rail Corporation. The Commission concludes that it should not revoke an exemption unless it finds that there is an abuse of market power, and that revocation will advance the rail transportation policy of 49 U.S.C. § 10101a. The Commission affirms the initial decision, to the extent that it declined to revoke the exemption for traffic handled by the Atchison, Topeka, and Santa Fe Railroad Company.

By the Commission, Chairman Philbin, Vice Chairman McDonald, Commissioners Simmons, Phillips, and Emmett.

DECISION

BY THE COMMISSION:

By petition filed July 18, 1988, G. & T. Terminal Packaging Co., Inc., Mr. Sprout, Inc., Tray Wrap, Inc., and Country Wide Produce, Inc. (petitioners)[1] have asked the Commission to revoke the regulatory exemptions for rail transportation of potatoes, tomatoes, and Brussels sprouts as they apply to shipments moving via Consolidated Rail Corporation (Conrail) to petitioners at their Kingsbridge, Bronx, New York, NY facilities or otherwise for their accounts. On June 17, 1989, petitioners amended their petition to request revocation of the exemptions for transportation provided by the Atchison, Topeka and Santa Fe Railroad Company (Santa Fe). The basis of their requests is that regulation is necessary because these carriers have abused their market power by improperly applying surcharges to their traffic, to retaliate against petitioners for having filed loss and damage claims against the railroads.

In an initial decision (ID) served February 13, 1991, an Administrative Law Judge (ALJ) concluded that Conrail's exemptions should be partially revoked, but that Santa Fe's exemptions should not because that carrier lacked market

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[1] Three of the petitioners, G & T, Mr. Sprout, and Tray Wrap, are owned by Mr. Anthony Spinale; the fourth, Country Wide, an independent wholesaler, is not, but was given by Mr. Spinale for no consideration to Gary Speier in 1978.

power over the issue traffic. Separate appeals to that decision have been filed by Conrail, petitioners, and one of the inspection agencies with which Conrail does business--the Transportation Inspection Agency, Inc. (TIA), formerly the Railroad Perishable Inspection Agency (RPIA).[2] As explained below, we will grant Conrail's appeal and deny petitioners' appeal. Given those actions, and inasmuch as we have no direct regulatory authority over TIA, we will dismiss TIA's appeal.

REGULATORY BACKGROUND

This case concerns the railroad exemption provisions of 49 U.S.C. § 10505. Congress enacted the exemption provisions in the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act), and strengthened them in the Staggers Rail Act of 1980 (Staggers Act). Those two laws fundamentally changed the way Congress directed the Commission to regulate railroads. For nearly a century the Commission had closely supervised the railroads, telling them what they could do, what they could not do, and how they were supposed to run their businesses. Concluding that this heavyhanded regulation contributed substantially to the railroads' financial decline, Congress relaxed the Commission's regulatory oversight.

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[2] RPIA and TIA will be referred to simply as "TIA."

In the 4R Act Congress directed the Commission to exempt railroad activities whenever it determined that: (1) regulation was not necessary to effect the national transportation policy; (2) regulation would be an undue burden; and (3) the matter was limited in scope. The legislative history indicated Congress's intention that the agency "try innovative, experimental programs to determine exactly what kind of less stringent regulation may work."[3]

Not satisfied with the pace or scope of regulatory reform under the 4R Act, Congress in the Staggers Act revisited and revised rail regulation in general and the exemption provisions in particular. In section 2 of the Staggers Act, Congress found that most transportation was competitive and that many government regulations had become unnecessary and inefficient. Accordingly, among other reforms, it broadened the Commission's exemption authority and directed the agency to pursue exemptions more aggressively. Section 10505 was amended to provide that the Commission must exempt when it finds that regulation is not necessary to carry out the national rail transportation policy of section 10101a (NRTP),[4] and either (1) the

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[3] H.R.Rep. No. 725, 94th Cong., 1st Sess. 243 (1975).

[4] The NRTP contains an assortment of policy goals to guide the Commission in regulating the rail industry, but generally it directs the Commission to minimize Federal regulatory control whenever "competition or the demand for services" will ensure reasonable rates and practices. 49

exemption is of limited scope, or (2) regulation is not necessary to protect shippers from abuse of market power. In the Conference Report (H.R.Rep. No. 1430, 96th Cong., 2d Sess. 105 (1980), Congress explained why it made these changes and how it expected the Commission to proceed:

> The policy underlying this provision is that while Congress has been able to identify broad areas of Commerce where reduced regulation is clearly warranted, the Commission is more capable through the exemption process of examining specific regulatory provisions and practices not yet addressed by Congress to determine where they can be deregulated consistent with the policies of Congress. The conferees expect that, consistent with the policies of this Act, the Commission will pursue partial and complete exemptions from remaining regulation. The conferees anticipate that through the exemption process the Commission will eventually reduce its exercise of authority to instances where regulation is necessary to protect against abuses of market power where other federal remedies are inadequate....

U.S.C. § 10101a(1).

Consistent with that Congressional directive, the Commission has pursued exemptions over the last 12 years, having exempted numerous commodities, services, and types of transactions from regulation.[5]

Under 49 U.S.C. § 10505(d), the Commission may revoke an exemption when it finds that regulation is necessary to carry out the NRTP. A petition to revoke must demonstrate conduct that frustrates the NRTP, and it must show that Commission regulation can and will be effective in carrying out the NRTP. Generally we will not revoke an exemption unless the regulatory provisions which would thereby be reinstated are capable of ameliorating the harm that a petitioner alleges. If the activities that constitute the basis of a petition to revoke are beyond the Commission's regulatory reach, revocation would serve little or no purpose. Moreover, violations must be serious enough to indicate abuse of market power which can and ought to be corrected by regulation. Thus, a finding of what might be a minor violation (if regulation were in effect), or a slightly adverse impact on one component of the NRTP, does not necessarily indicate that reregulation is appropriate. Such a finding would have to be balanced against all of the other relevant NRTP factors, to determine whether revocation and

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[5] During the early 1980's, the Commission exempted the commodities at issue here from rate and most other Commission regulation under the agricultural commodities and boxcar exemption rules at 49 C.F.R. § 1039.10 and § 1039.14.

reregulation are necessary. An element of this assessment may be the effect of the exemption (and of potential revocation) on the rail industry and the shipping public overall.

We also wish to emphasize that a revocation petition focuses on traffic that has previously been exempted from Commission regulation on the basis of this agency's conclusion that the marketplace itself is sufficiently competitive so as not to require continued government regulation. Thus, a party has a burden of showing that our prior findings supporting the initial exemption were clearly wrong, or that changed circumstances require us to revisit them. In this proceeding, as we shall discuss later, we decline to revoke because petitioners have failed to justify reregulation.[6]

THIS CASE

This case focuses primarily on rail transportation of potatoes moving from Idaho to complainants' facilities in New York City. The potatoes move in through rate service, using a variety of originating carriers. Conrail, however, is

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[6] We note that since 1984 petitioners have filed numerous court actions against these and similar defendants, raising Sherman Act, Interstate Commerce Act, constitutional law, common law, antitrust, and civil fraud claims. Their claims have been found to be without merit by the courts. *See* note 14, *infra*.

the only delivering carrier that serves petitioners, and it is Conrail with which petitioners have their principal dispute.[7]

Petitioners are produce dealers operating out of New York City. Petitioners have a long history of filing claims and initiating litigation involving this traffic, which predates the formation of Conrail in 1976. Conrail "inherited" over $2.1 million in freight loss and damage claims, to which were added $2 million representing 333 additional claims from 1976 through mid-1979. Moreover, although under the Interstate Commerce Act shippers are not permitted to withhold applicable freight charges to offset other claims they may have against a carrier,[8] Conrail inherited $60,000 in overdue demurrage and detention charges[9] that petitioners had withheld from its predecessor because of the controversy

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[7] Petitioners also asked to have the exemption revoked as to tomatoes and Brussels sprouts. The ALJ found, however, that Conrail has handled virtually none of that traffic for petitioners. For that reason, and inasmuch as petitioners have submitted minimal evidence or argument as to tomatoes and Brussels sprouts, the ALJ's decision not to revoke the exemption as to those commodities will be affirmed without further discussion.

[8] *See Pennsylvania R. Co. v. International Coal Mining Co.*, 230 U.S. 184 (1913).

[9] Demurrage and detention are charges to shippers or receivers for holding railroad cars on the customer's siding beyond a period of "free time."

over the damage claims. The Spinale petitioners amassed another $235,000 in unpaid transportation charges from 1976 through mid-1979.

These matters (through mid-1979) were settled in mid-1981, but the conflict continued. Conrail points out (and petitioners do not deny) that in the early 1980's petitioners filed loss and damage claims on virtually every car they received. From mid-1979 to mid-1983, petitioners filed over 500 additional claims grouped in ten separate lawsuits, totaling over $4.4 million. During the period 1980 to mid-1982, for which complete specific carload and claims data are available, Conrail states that the Spinale petitioners received 1,125 carloads, representing about $1.5 million in Conrail revenue, on which they filed 462 claims with Conrail (out of a total of 574 claims filed by the Spinale petitioners against all railroads) for a total of about $3.3 million. This translates into about $3,000 per carload, more than twice the revenue charged by Conrail for performing the transportation. In the first half of 1982 alone, petitioners' claims against Conrail exceeded $4,000 per car. Updated Conrail information for 1983 indicates that petitioners continued a high level of claims activity (111 claims from 466 carloads, averaging $1,330 per carload for all claims), but filed only 30% of these against Conrail directly. Approximately 6% of the gross amount claimed by

petitioners was paid.[10] *See* Conrail's witness Kurt, Reply Statement, Vol. 1, Ex. 3.

As the ALJ noted, shippers and shipper associations, like the railroads, also experience numerous claims filed by petitioners. Several refuse to do business with petitioners, while others place conditions on their willingness to deal with them.[11]

Conrail, however, is a common carrier, and a common carrier, to the extent it is able to do so, has an obligation to provide service to the general public.[12] Thus it is not as easy for Conrail to walk away from petitioners as it is for most businesses. Instead of refusing to serve petitioners, Conrail imposed a surcharge of $500 to $600 per

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[10] As a consequence of this acrimonious business, relationship, in 1983 petitioners stopped paying any detention and demurrage charges to Conrail. According to Conrail, the total of all such charges due and owing to Conrail as of February 1990 was about $2 million.

[11] *See* ID at 13; testimony of the Idaho Grower Shippers Association and the Northwest Perishable Shippers Cooperative Association, reproduced in Volume 2 of Conrail's reply statement, Feb. 23, 1990.

[12] *See B.J. Alan Co., Inc. v. United Parcel Service, Inc.*, 5 I.C.C.2d 700 (1989), *aff'd*, *B.J. Alan Co. v. ICC*, 897 F.2d 561 (D.C.Cir.1990), *cert. denied*, 112 S.Ct. 1760 (1992).

car on traffic moving to petitioners, which it stated was designed to compensate itself for the expenses, above and beyond ordinary business expenses, associated with serving petitioners. Later, to protect itself in the future from petitioners' practice of refusing to pay demurrage and detention charges, Conrail initiated what came to be known as "Rule 10" procedures, under which it required, as a condition of doing business, that petitioners either settle their demurrage and detention accounts or post a letter of credit guaranteeing payment of applicable charges in the future.[13]

Santa Fe originates certain California potato shipments to petitioners. In June 1989, Santa Fe surcharged petitioners' freight rate to Kingsbridge by amounts up to $500 a car, on the ground that petitioners' claims as to the shipments it handles were excessive.

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[13] Conrail imposed Rule 10 procedures on one other delinquent-shipper, which apparently settled its past accounts and resumed business as usual. In a decision served June 22, 1989, in this proceeding, we found that Conrail's Rule 10 payment security plan was reasonable in the circumstances and not discriminatory or otherwise unlawful requiring revocation of its exemptions. Although petitioners challenge that finding, we see no reason to disturb it here.

After unsuccessfully seeking various forms of relief in numerous agency and court cases,[14] petitioners asked the Commission to revoke the exemptions as to Conrail (and, later, as to Santa Fe, which was joined as a party by Commission decision served August 3, 1989). In their revocation petition, petitioners alleged that, since June 1983, Conrail's surcharge[15] had unlawfully discriminated against them. In petitioners' view, Conrail imposed the surcharge not for any lawful purpose, but rather to punish them for exercising their legitimate loss and damage claims rights in violation of 49 U.S.C. § 11707.[16] They further asserted that

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[14] Some of the cases in which petitioners unsuccessfully sought relief were *G. & T. Terminal Packaging v. Conrail*, No. 84-1173 (D.N.J. Sept. 7, 1984); *Consolidated Rail Corp.--Declaratory Order--Exemption*, 1 I.C.C.2d 895 (1986); *G. & T. Terminal Packaging Co., Inc., et al. v. Consolidated Rail Corporation*, 646 F.Supp. 511 (D.N.J.1986), *aff'd*, 830 F.2d 1230 (3rd Cir.1987), *cert. denied*, 108 S.Ct. 1291 (1988); *Mr. Sprout, Inc., et. al. v. Merchants Despatch Transportation Corp.*, No. 87-1574 (D.N.J. Mar. 2, 1988); *County Wide Produce v. Southern Pacific Transportation Company*, No. 87-4992 (S.D.N.Y. Sept. 1, 1988); and *G. & T. v. Smith*, No. 14383/83 (N.Y.Sup.Ct., N.Y.Cty., Dec. 3, 1983).

[15] Petitioners allege that the surcharge at one point reached as high as $794.

[16] The Spinale petitioners charged that, in addition to surcharging them, Conrail had also illegally "red lined" shipments destined to other companies such as Produce

Conrail knowingly relied on fraudulent inspection reports prepared by two inspection agencies in denying petitioners' legitimate claims. In addition to revocation of the exemptions, petitioners sought monetary damages[17] and injunctive relief. Petitioners alleged that Santa Fe's surcharge, like Conrail's, was unlawfully discriminatory, warranting revocation of Santa Fe's exemptions.

In the ID, the ALJ found that the surcharge was being used to force petitioners to stop exercising their legitimate claims.[18] He ordered that, unless and until it

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Packing Materials, Inc. and petitioner Country Wide, which had filed few or no claims against Conrail but which were viewed as friendly to the Spinale petitioners.

[17] In a petition filed January 6, 1992, petitioners requested, pursuant to 49 C.F.R. §§ 1113.13 and 1117.1, that the Commission allow them to supplement the damages portion of the record with information concerning Conrail's allegedly improper interference with petitioners' former lease agreement with U-Haul. Conrail replied in opposition to the request. We will deny petitioners' request. The damages issue is moot given our resolution of the revocation requests.

[18] The ALJ found that petitioners' claims were not excessive because they were generally paid. But petitioners filed substantially more claims than other New York City produce dealers, only about six percent of which were actually paid by Conrail.

withdrew the surcharges, Conrail's exemptions for western potatoes moving to Kingsbridge would be revoked.

The ALJ concluded that revocation was appropriate because Conrail exerts market power over petitioners' potato traffic. The ALJ expressly found that Conrail's rate levels were immaterial to the question of market power. His view was that rate levels would be relevant if this case involved maximum rate reasonableness issues, but that they had nothing to do with the discrimination issues that he saw as the principal substantive questions raised. As petitioners in his view have no transportation, product, or geographic substitutes available for Idaho russet potatoes, he found that Conrail possesses market power.

Although the ALJ did not frame his conclusions this way, we infer that he also found that Conrail abused its market power by imposing its surcharge in what would have been an unreasonably discriminatory manner if the provisions of 49 U.S.C. § 10741(a) had applied.[19] In finding discrimination, he applied a standard of proof to petitioners that was far less rigorous than the Commission applies in cases arising under regulation. He did not require a showing of any of the routes used by the unnamed competitors that were allegedly preferred by Conrail, nor did

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[19] The NRTP, 49 U.S.C. § 10101a(13), complements § 10741 by directing the Commission to prohibit unlawful discrimination.

he consider whether the alleged harm could have been caused by factors other than the surcharge. Moreover, he rejected Conrail's justification for the surcharge--the high costs associated with petitioners' claims filing--on the ground that Conrail's cost of serving petitioners (save some costs of processing loss and damage claims) was essentially the same as the cost of serving other nearby produce dealers.[20]

Finally, the ALJ found that Conrail engaged in unreasonable practices in violation of 49 U.S.C. § 10701(a) by endorsing unreasonable damage claim processing and reports by the Merchants Dispatch Transportation Corporation (MDT) and TIA. These agencies inspect freight shipments and prepare reports that are used, along with other information such as inspection reports prepared by the U.S. Department of Agriculture, in resolving loss and damage claims. Consistent with earlier court resolution of the question, the ALJ found that the agencies had not "falsified" their reports. He concluded, however, that they have for years produced erroneous or incomplete inspection reports designed to protect Conrail from paying legitimate claims. He found (ID at 47) that Conrail acted improperly by "[a]ctively avoid[ing] early and accurate identification of the

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[20] It is not clear whether the ALJ intended to "allow" claims processing costs in determining whether the surcharge was, in his view, "cost justified." Moreover, since he found that petitioners' claims were "proper," it appears that he disallowed the use of the claims paid as a "cost justification" as well.

cause of damages, [greatly enlarging] ... the costs of processing or settling claims...."

Turning to Santa Fe, the ALJ summarily concluded, with no discussion, that Santa Fe has also engaged in discrimination vis-a-vis petitioners. He found, however, that because other rail competition constrains Santa Fe's market power from California origins to New York City, its exemption should not be revoked.

As indicated, appeals to the ID have been filed by Conrail, petitioners, and TIA. We will grant Conrail's appeal. We will deny petitioners' appeal. As TIA is not subject to this agency's jurisdiction, and as we therefore can not afford it relief, we will dismiss its appeal.[21]

DISCUSSION AND CONCLUSIONS

I. REVOCATION OF CONRAIL'S EXEMPTION

As we have indicated, Congress has directed us to exempt rail service when regulation is not necessary to protect against abuse of market power. Therefore, the first thing we look at in assessing a petition to revoke an

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[21] The initial statutory deadline for issuance of a decision on these appeals was September 20, 1991. However, due to the complexity of the case, the deadline has now been extended to July 16, 1992.

exemption is whether the carrier possesses substantial market power. If it does not, then there is generally no basis for revoking an exemption. If it does, then we focus on whether regulation is necessary to protect against carrier abuse of shippers as a result of such market power. Finally, in assessing whether regulation is necessary or appropriate, we address whether regulation or exemption would, on balance, better advance the objectives of the NRTP and the interests of the shipping public overall.

A. *The Surcharge--Market Power.*

Although Conrail has imposed surcharges on petitioners' traffic, in our view it does not possess enough market power to warrant regulation. We recognize, as the ALJ found, that Conrail is the only rail carrier delivering Idaho potatoes into New York City; that Western potatoes destined for New York appear to move more efficiently by rail than by other modes; and that, at least in the minds of one retailer that participated in this case, Idaho potatoes are a distinctive product. We reject, however, the ALJ's general finding that Conrail has market power over petitioners' traffic, and specifically we reject his refusal to consider Conrail's rate levels in making that determination.

The ALJ concluded that although rate levels are relevant in a maximum rate case, a discrimination case under § 10741 focuses only on relative, not absolute rate levels. That is true, but this case is neither a maximum rate case

under § 10701a nor a discrimination case under § 10741. This is an exemption case, and although the policies of both §§ 10701a and 10741 are relevant, in an exemption case we look first at the basic market power issues that were the focus of the Staggers Act overall. In that regard, we note that the maximum rate principles of the Staggers Act were not developed in a vacuum. Indeed, the basic focus of the Staggers Act was to reduce all regulation, including maximum rate regulation, when the lack of market power limits the ability of carriers to take unfair advantage of shippers.

There are various facets to a market power inquiry. Some, such as the rate levels of various transportation alternatives, or the substitutability of other products, are similar to the questions the ALJ asked in this proceeding. Those questions are subjective and leave the decisionmaker a lot of policy discretion.[22] The most important, threshold

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[22] In that regard, Conrail presented evidence that potatoes from other origins compete with Idaho russets, and that petitioners' participation in the non-Idaho market remained strong despite the surcharge (known in ICC parlance as product and geographic competition). *See* V.S. Casavant, at 9-12, table, and at tables 7, 8, and 9; V.S. Saperstone, Exhibits D, F, I, and J, Conrail's Feb. 23, 1990 statement. Conrail also presented evidence that petitioners trucked Idaho potatoes arriving in Philadelphia via CSX Transportation, Inc. into New York (known as intermodal and geographic competition). This evidence,

question in a market power inquiry, however, is the one that the ALJ refused to address here--the level of rates charged by the allegedly dominant carrier in relation to its costs.[23]

Here, Conrail has shown that its rates on western potato traffic for 1987, 1988, and 1989 to Kingsbridge, Hunts Point, and other New York area destinations, including the surcharge and all claims-related costs, barely return its variable costs.[24] Even excluding legal costs and

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which the ALJ found unpersuasive, provides some support for Conrail's claim that it lacks market power.

[23] "Variable costs," the term that is used in this case, are costs that vary with output (such as fuel or labor). "Fixed costs," by contract, are costs that do not vary with output (such as truck, locomotives, etc.). Because overall, railroads must earn revenues that meet or exceed all of their costs, ideally each traffic segment should earn enough revenue to cover variable costs and make a contribution to fixed costs. On competitive traffic, however, a railroad may decide to charge a price that covers variable costs but makes only a minimal contribution to fixed costs, on the theory that a higher rate will result in traffic diversion and deprive it of any contribution to fixed costs. Obviously a railroad cannot price all of its services at or near the variable cost break-even point. Railroads will usually do so only in very competitive markets.

[24] Conrail witness Wilke, Appendixes A, B, C, D, and M, Rail Form A costs; and Appendix L, URCS costs. The levels of these costs are unchallenged, although the inclusion

the costs of processed and paid claims, Conrail's revenues for its share of potato movements to petitioners' Kingsbridge facility exceeded its variable costs by only 17% in 1987 and 13% in 1988.[25]

Moreover, from 1980 to 1989, during the post-Staggers and exemption period, the real rate (after inflation) per hundred pounds for the rail movement of potatoes from Idaho to New York declined by almost 30%. Petitioners' inflation-adjusted rate, including the surcharge, declined by 24%. This indicates a very competitive market for all western potatoes, regardless of whether or not Idaho potatoes represent a unique market.[26]

It is clear that Conrail's rates on western potatoes are not the rates of a carrier with market power. The evidence on this record does not dispositively establish what is driving the rates down to nearly noncompensatory levels, but what

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of claims payments and legal costs is challenged.

[25] *See* Conrail witness Braeutigam, Tables 1 and 3, in Volume 2 of Conrail's February 23, 1990, reply statement. Braeutigam's tables are based on the statement of Conrail witness Wilke in Volume 1 of that reply statement.

[26] *See* statement of Conrail witness Casavant. Conrail witness Braeutigam demonstrates that such low R/VC ratios indicate an extremely elastic demand, one descriptive of almost perfect competition. The fact that the ratios remain so low indicates pervasive competition.

we do know is that a carrier with market power does not price at variable cost. The fact that Conrail barely breaks even on petitioners' traffic, in our view, precludes a finding that Conrail has market power over the traffic at issue.

B. *Discrimination--Abuse of Market Power.*

Revocation of the exemption would be difficult to justify given Conrail's lack of market power. The ALJ, however, found market power. As we read his approach, he went on to address whether Conrail had abused its market power by unreasonably discriminating against petitioners in retaliation for their having filed claims. His standard of proof on the discrimination inquiry that he pursued was far too lenient as to petitioners and far too strict as to Conrail, and his finding of unlawful discrimination was not supported.

The provisions of 49 U.S.C. § 10741 provide that a common carrier may not unlawfully discriminate against its shippers. Discrimination is defined as charging different rates for like traffic and services. Longstanding case law has established that, to prove unreasonable discrimination, a complainant must show that a rate disparity exists between the rates it pays and the rates charged to its competitors; that there is actual or potential competitive injury; that the defendant is the common source of both the prejudicial and preferential rate; and that the rate disparity is not justified by transportation conditions. Once the first three elements are

shown, the burden shifts to the defendant to show that the rate disparity is justified by transportation conditions. *See, e.g., Dresser Industries, Inc. v. I.C.C.*, 714 F.2d 588 (5th Cir.1983); *Nueces County Nav. Dist. No. 1 v. I.C.C.*, 674 F.2d 1055 (5th Cir.1982), *cert. denied*, 459 U.S. 1035 (1982); and *Harborlite Corp. v. I.C.C.*, 613 F.2d 1088 (D.C.Cir.1979).

The discrimination provisions were narrowed in the Staggers Act, with the addition of § 10741(f). That provision precludes a finding of discrimination unless the allegedly preferred and prejudiced points are on the same route.

In their pleadings, petitioners did not identify any of their competitors that receive potatoes in New York City. The ALJ, however, found that Conrail was guilty of discrimination, noting (ID at 42) that "there is no doubt that such receivers exist." And in support of his finding that such unidentified receivers were favored, the ALJ relied on the testimony of a New York grocer who testified that petitioners had been his principal Idaho potato suppliers before the surcharge, but that after the surcharge their prices had gotten too high. The ALJ essentially ignored the separate route provisions of § 10741(f).[27]

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[27] The ALJ's decision seems to conclude that since Conrail's surcharge applied only to Conrail's portion of its through rate, and since it applied only to petitioners' traffic (and the traffic of a few other businesses with an affinity

We think that, had this case arisen under § 10741, the ALJ would have committed clear error by ignoring the separate route provisions of section 10741(f). Although petitioners failed to identify any of their competitors, they did indicate that their primary point of receipt was at Kingsbridge, while the rates that they seemed to complain about applied to other points in the New York City area, such as Hunts Point, Mt. Kisco, and Mt. Vernon. We note, however, that these four points are separate destinations located on different rail lines. Mt. Kisco lies far to the north in Westchester County, Hunts Point is on the East River in the Bronx, Mt. Vernon lies north of the Bronx, and Kingsbridge is on a different line to the south and east, directly north of Manhattan. No other company seems to be located at Kingsbridge other than petitioners'.[28] Rail

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toward petitioners), there was no need for proof of a rate disparity, or that there was common control (i.e., that the same carriers controlled the rates between the preferred and prejudiced points). Historically a complainant was required to show that the same carriers participated in the entire movement from origin to destination (common control). The ALJ, rather than assessing the question in this manner, simply looked at Conrail's portion of the line, rather than the movement from or to origin or destination.

[28] Petitioners indicate that in August 1991, they left Kingsbridge and moved to new facilities at Hunts Point, where they suggest other receivers of like commodities are apparently located. Petitioners have not, however, identified any "advantaged" shippers or receivers at that location.

movements to those points are movements to different destinations, and thus, are movements over "different routes." We do not see how the ALJ, in reviewing this case under § 10741, could have gotten past section 10741(f).[29]

We also do not agree with the ALJ's finding that petitioners proved competitive injury resulting from the surcharge. A few witnesses did testify that petitioners' prices went up to noncompetitive levels after the surcharge, and that Mr. Spinale blamed the price rise on the surcharge.[30] Petitioners also provide data purporting to show a precipitous drop in the unloading of potatoes at the Kingsbridge facility

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[29] Section 10741(f) has been interpreted narrowly by the courts. In a recent case the Commission tried to construe the provision broadly so as to permit continued discrimination complaints by shippers of recyclables. Even though a separate provision of the Act seemed to authorize continued recyclables discrimination complaints, which by definition involved different origins and destinations, the court found that the new provisions were intended to limit the availability of the discrimination remedy, and that they meant what they said. *See Consolidated Rail Corp. v. United States*, 896 F.2d 574 (D.C.Cir.1990).

[30] *See*, for example, statements of Louis Guerra, Hymie Grappel, and Vito Larocca, included in the appendix of petitioners' statement of December 21, 1989, at 6-8.

(from 493 cars in 1983 to 296 in 1984 to 110 in 1985).[31] Conrail, however, points out that 1983 was characterized by unusually high potato shipments.[32] More detailed data, the carrier states, show that, following the imposition of the surcharge, the volume of potato deliveries to G & T in the last half of 1983 and the first half of 1984 was well above 1982 levels.[33] Conrail also shows that five of seven of G & T's largest customers increased their purchases in 1984 over 1982 and 1983.[34] It is not clear that petitioners' Idaho potato business suffered as much as petitioners claim, and in light of the increased sales of other western potatoes, it is doubtful that petitioners suffered the degree of injury they alleged, even if their Idaho potato sales declined.

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[31] Statement of Mazie Faraci in appendix of petitioners' brief, December 21, 1989, at 5.

[32] Conrail's witness Casavant, reply statement, Vol. 2, Table 7, shows that 1983 Idaho potato shipments were the highest on record prior to 1987; Table 12 shows that 1983 experienced the highest volume of rail shipments of potatoes since 1977 and of rail "unloads" since 1980.

[33] Conrail's witness Saperstone, reply statement, Vol. 5, Exhibit G.

[34] Report of Thomas J. Reilly of Arthur Anderson & Co., December 2, 1985, in Conrail's witness Saperstone's reply statement, Vol. 5, Exhibit A. The two firms that decreased their purchases from G & T assertedly did so for reasons other than price.

Finally, even if petitioners did suffer lost sales overall following the imposition of the surcharge, we see no showing that the surcharge in itself was the principal reason for any losses that may have been incurred. Petitioners here did not prove competitive harm. G & T's witness Grappel stated in 1984 that he felt that G & T's price differential of "ten cents per five-pound bag"[35] (or 2 cents per pound) was a "big difference" which necessitated that he make only occasional purchases from G & T.[36] The $500-$600 per car surcharge amounts to only about one-half cent per pound for potatoes, or one-fourth of petitioners' markup in potato prices.[37] Thus G & T apparently marks up its produce substantially. There was no showing that any competitive losses were the direct result of Conrail surcharges; rather, it

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[35] Petitioners statement of January 4, 1990, at 52.

[36] The ID relied heavily on this witness's 1984 assertions, and on his later (1989) assertions that the G & T price differential had increased to between 3 cents and 5 cents per pound, in reaching a finding that petitioners were competitively harmed by the surcharge. (ID at 30-31.)

[37] Estimates using petitioners' and Conrail's shipment data show a cost of 0.55 cents per pound for 1983 and 1984, and about 0.40 to 0.45 cents per pound in more recent years, due to heavier per car loading of potatoes. Imposition of the additional Santa Fe surcharge of $500 in June 1989 increased the total surcharge to petitioners to about 0.80 cents per pound.

is just as likely that they resulted chiefly from G & T's discretionary pricing practices.

We do not require that a petitioner must always make what would be a perfect case under regulation before it can have an exemption revoked.[38] The record in this case, however, is voluminous, and we still do not have the basic elements needed to make a discrimination case. Without knowing who the preferred parties are, where their traffic originates and terminates, and who their participating carriers are, we do not agree with the ALJ's finding that

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[38] *See, e.g.*, Docket No. AB-167 (Sub-No. 1088X), *Consolidated Rail Corporation--Exemption-- Abandonment of the Weirton Secondary Track in Harrison and Tuscarawas Counties, OH* (not printed), served June 14, 1989, where we revoked an exemption in order to conduct a more thorough review of the impact of a proposed Conrail abandonment, carrier liability under § 11707 is ... a cost which may be taken into account in fixing rates. [§] 11707 prohibits rail carriers from relieving themselves of the cost of paying loss or damage claims [, but it] does not deal with what costs may be taken in account in determining rates. Indeed the 4R Act, as amended by the Staggers Act, states specifically that "[n]othing in this subsection or § 11707 ... shall ... give the Commission the authority to require any specific level of rates or services based upon the provisions of § 11707...." 49 U.S.C. § 10505(c). Under the 4R Act and the Staggers Act, levels or rates of service are to be determined primarily by competition in the marketplace for transportation services.

petitioners would have met their burden of proof, had this been a case under § 10741 of the Act.

Since the ALJ reached this finding, he then turned to the fourth element of discrimination; whether the rate disparity is justified by different transportation circumstances. Here, in contrast to the lenient burden of proof imposed on petitioners, the ALJ held Conrail to a stricter standard of proof.

Conrail's position is that the surcharge is justified by the additional costs associated with handling petitioners' traffic that are not incurred in handling other New York City produce traffic. Among other things, Conrail identified costs associated with the filing and processing of claims, such as administrative, collection, and inspection charges over and above those attributable to other New York receivers; above average claims paid to the Spinale petitioners; legal expenses attributable directly to the Spinale petitioners' claims activities; interest on unpaid detention and demurrage charges; and future claims expenses. The ALJ, with whom petitioners agree, virtually excluded Conrail's claims payments and legal costs from consideration, finding that allowing carriers to cover the costs of legitimate claims from specific shippers, no matter how unique or above normal, "would extinguish the statutory right of G & T to file claims" (ID at 3, 47).

Clearly loss and damage experience is, and has always been, a relevant consideration in ratemaking and rate classification generally. *See Railway Cost Recovery Procedures*, 1 I.C.C.2d 207, 223-24 (1984); *Fresh Meats from Midwest to East*, 313 I.C.C. 345, 369 (1961); *Investigation Into Motor Carrier Classification*, 367 I.C.C. 243 (1983). And it is relevant not only in setting rates or classifications for broad commodity or territorial groups, but also in setting rates for particular shippers. Indeed, in an earlier phase of this dispute, the court noted that:

> carrier liability under § 11707 is . . . a cost which may be taken into account in fixing rates. [§] 11707 prohibits rail carriers from relieving themselves of the cost of paying loss or damage claims[, but it] does not deal with what costs may be taken in account in determining rates. Indeed, the 4R Act, as amended by the Staggers Act, states specifically that "[n]othing in this subsection or § 11707 . . . shall . . . give the Commission the authority to require any specific level of rates or services based upon the provisions of § 11707 . . . ." 49 U.S.C. § 10505(e). Under the 4R Act and the Staggers Act, levels or rates of service are to be determined primarily by competition in the marketplace for transportation services.

G. & T. Terminal Packaging Co., Inc. v. Consolidated Rail Corp., 830 F.2d 1230, 1233 (3d Cir.1987).

Of course, in a given case, a carrier's allocation of loss and damage expenses to a particular shipper might be found to be unreasonable. Here, however, petitioners have clearly not shown that Conrail's actions were particularly egregious. They have not demonstrated that Conrail handles their traffic more carelessly than it handles the traffic of other shippers, or than other carriers handle comparable perishable traffic. To the contrary, they concede that their loss and damage experience is similar to that of other receivers who file few or no claims. Petitioners have not shown that Conrail cannot consider its costs of doing business with them as part of its ratesetting strategy.[39]

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[39] There is a rational basis for charging costs to the ratepayer occasioning the costs rather than the shipping public in general. *See Report of the Railroad Accounting Principles Board, Railroad Accounting Principles Final Report*, September 1, 1987, Vol. 2, at 9. The Causality principle states:

> Costs shall only be attributed to cost objectives when a causal relationship exists (the cost would have not been incurred but for the requirements of the cost objective). A cost objective is the result of the use of resources.

Petitioners, however, also claim that Conrail did not adequately justify with its studies the level of the surcharge, even if all of its costs of doing business were permitted.[40] But petitioners have failed to submit alternative cost studies or otherwise specifically challenge the actual cost component levels developed by Conrail. Conrail argues that all disputed costs--defined as those attributable to allegedly unreasonable acts by the inspection agencies in processing petitioners' claims--make up only $48 of the total loss and damage costs per car incurred by Conrail in serving petitioners in 1988. Thus, according to Conrail, had all of the disputed claims processing costs been disallowed, undisputed costs would still yield a cost differential between petitioners and other New York City potato receivers of over $700 per car--a significant differential far exceeding the surcharge.

Conrail has shown that the relatively minor administrative-type costs associated with filing and processing claims which exceed similar costs occasioned by other receivers come to about $60 to $160 per car.[41] As

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[40] The ALJ similarly went to great lengths to impeach Conrail's calculations initially used to establish the level of the surcharge. ID at 14-17. Those calculations came from a 1982 internal cost study. Conrail substantially upgraded the study with February 1990 submissions by witnesses Kurt and Wilke.

[41] Conrail reply statement, Vol. I, February 23, 1990, witness Kurt, Exhibit 6.

noted, Conrail further supports its cost study in submissions filed in February 1990, which show that Conrail's claims actually paid to petitioners exceed those paid to other shippers by between about $200 and $700 per car.[42] Adding even the lowest amount of these claims payment amounts to claims processing costs shows costs uniquely attributable to petitioners of about $300-400 per car.

In its 1990 study, Conrail estimated net litigation costs attributable to the Spinale petitioners to be about

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[42] The total "paid" and "open" claims for 1980, 1981, and the first half of 1982, at the time Conrail was preparing its surcharges, amounted to approximately $722,000, or about $642 per carload shipped during that 30-month period. Conrail's final settlement payments to petitioners were probably less than the $642 figure because a smaller percentage of the gross amount claimed by petitioners was actually paid (6.2 percent in 1980). If this 6.2 percent were applied to petitioners' 1981 and 1982 claims, the payments would have been $392 and $535 per car, respectively. To get a "net" claims paid cost, average claims of other receivers would be subtracted. Those claims amounted to $26 and $42 per car for all other perishables receivers in 1986 and 1987, the only years for which such data appear to be available. In more recent years (1986-1989), claims paid by Conrail to the Spinale petitioners in excess of those paid to Hunts Point receivers amounted to between $124 and $248 per car. Total claims paid in 1988 to G & T by Conrail and its connections were $623 per car more than claims paid to other New York area potato receivers.

$1,092 per car for 1986, $420 per car in 1987 and 1988, and $1,290 in 1989. Because $2.9 of the $4.5 million in claims resulted from pre-surcharge claims activity, we have redistributed a large portion of the legal costs shown for those years to earlier years. We have also sought to differentiate between inside and outside counsel expenses. Using such an approach, we estimate that legal costs for the pre-surcharge years probably would have been $100 or more per car.[43] Therefore, net combined claims payments, processing costs, and litigation costs attributable uniquely to the Spinale petitioners for the early years were likely about $400-$500 per car. For 1987 and 1989, respectively, they were about $679 and $1,574 per car.[44] These costs, plus the costs of setting aside reserves for pending and future litigation, indicate to us that the level of the surcharge is not out of line with the costs uniquely assignable to petitioners.

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[43] In Exhibit 6, witness Kurt finds inside legal costs incurred for G & T for 1987 to be 35% of total litigation costs, and to be 46 percent for 1989. If the same percentages of inside-to-total legal costs were assumed for the pre-surcharge years when only outside legal costs were computed, the total legal costs for these years attributable to G & T would be between $75 and $150 per car, depending on the estimates utilized.

[44] Conrail reply statement, witness Kurt, Exhibits 5 and 6.

Conrail's 1990 cost study is thorough, essentially unrebutted, and apparently reasonable. Nevertheless, it has often been said that costing is an art, not a science. Hence, we cannot say here with absolute certainty that Conrail's Spinale-related costs clearly match its surcharge dollar for dollar. But what is clear is that there are costs associated with petitioners, that are not associated with any other shippers with which Conrail deals, and that they are substantial. Indeed, in 1981, G & T alone filed 212 of a total of 257 claims filed by potato receivers directly with Conrail; in 1982, G & T filed 122 out of 160 such claims. Notably, however, G & T accounted for only seven percent of Conrail's potato volume.[45] Conrail's showing appears reasonable to us, particularly in light of the fact that petitioners have not identified either competitive injury or that they were discriminated against vis-a-vis a similarly situated receiver, one located at the same point and served from the same origin over the same route.

Finally, even resolving the costing question most favorably to petitioners, and holding that Conrail's costs would not constitute dissimilar circumstances to justify the surcharge, we would not find that Conrail's course of conduct here warrants reregulation. We are not adjudicating a complaint under the Act. Rather, we are deciding whether to exercise our authority to revoke an exemption that has

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[45] *See* Conrail's witness O'Riley, reply statement, Vol. I, at 3.

already been granted. The surcharge and the surrounding circumstances are relevant as indicators of Conrail's propensity to charge petitioners unreasonably high or discriminatory rates, contrary to the NRTP. But petitioners have not even alleged unreasonably high rates, and they have fallen substantially short of making a prima facie case of discrimination.

In short, Conrail has not been shown to be involved--or inclined to get involved--in any activity we would have authority to proscribe if we exercised our authority. At worst, Conrail has imposed a charge on a customer that exceeds the incremental costs which the railroad has cited as a reason for imposing the charge. We involve ourselves in these matters, post-Staggers, only under certain circumstances. One of the most important of those is that the customer lacks self-help remedies. As we have already found, however, Conrail does not possess market power. The rail transportation policy places strong emphasis on reliance on market forces. *See* 49 U.S.C. 10101a(1), (2), and (6). It simply has not been shown that we should intervene here and upset those market forces.

B. *Revocation--The Inspection Reports.*

Petitioners also assert, as grounds for revocation, that Conrail engaged in unreasonable practices regarding inspection reports prepared by TIA and MDT. Conrail responds that the ALJ properly found no fraud in the

inspection agencies' practices (particularly their do-not-speculate-about-liability rule) and did not order such practices changed. It claims that reports were required to be rewritten only where the inspector had exceeded his function and/or expertise. Conrail argues that the ALJ had no basis for finding an unreasonable practice in these circumstances.

Petitioners disagree. They argue that Conrail knew about, and actively encouraged, the preparation by its inspection agencies of misleading inspection reports. They support the ALJ's finding (ID at 43) that "Conrail is well aware of the practices of [TIA] and MDT and, in fact, endorses those practices."

We will reverse the ALJ's finding of an unreasonable practice. Although the courts that have addressed this issue have found no fraud on the part of Conrail or the inspection agencies, petitioners have presented evidence that, in at least some instances, the inspection agencies slanted reports in the railroads' favor.[46] But we think we would be stretching our

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[46] From a review of the evidence before us, particularly the videotaped depositions, it appears that Conrail at a minimum was aware of the preparation of reports that petitioners felt were slanted. A number of inspectors testified that reports often had to be rewritten using certain terminology improperly shifting blame for damage away from the railroad, because "the railroad wants it done this way." It also appears that petitioners frequently complained to Conrail about what the inspectors were doing.

jurisdiction if we said that, because Conrail may have known about the inspection agencies' reporting practices, it committed an unreasonable practice by adding to the cost of the inspection process, or by raising its rates (a minimal amount) by virtue of obtaining lower claims settlements.

Under § 10701(a), a rate, tariff, or practice related to transportation or service must be "reasonable." In *Shippers Committee v. Ann Arbor Railroad Co.*, 5 I.C.C.2d 856, 863 (1989), the Commission pointed out that conduct, to constitute an unreasonable practice, should relate to a transportation activity subject to regulation under the Interstate Commerce Act.[47] The type of activity here,

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[47] The Commission has addressed a variety of issues under the unreasonable practice provisions of the Act. *See, e.g., Consolidated Rail Corp. v. I.C.C.*, 646 F.2d 642 (1981) (STS-based tariffs); No. 40298, *The Society of the Plastics Industry, Inc. v. Consolidated Rail Corporation, et al.* (not printed), served October 22, 1990 (MIFTR tariff publication); *Shippers Committee*, supra (OT-5 approvals for covered hopper cars); No. 40143, *Missouri-Kansas-Texas Railroad Company--Certainteed Corporation--Joint Petition for Declaratory Order* (not printed), served July 27, 1988 (collection of undercharges); *Commonwealth Edison v. Aberdeen & Rockfish R., et al.*, 2 I.C.C.2d 642 (1986), *rev'd sub nom. Union Pacific R.R. Co. v. ICC*, 867 F.2d 646 (D.C.Cir.1989) (evading common carrier obligation to transport spent nuclear fuel in regular train service by charging excessively high rates); and *Buckeye Cellulose Corp. v. L & N R.R. Co.*, 1 I.C.C.2d 767 (1985) (collection

freight inspections, is not a rate or tariff practice that the Commission has traditionally considered in the context of our unreasonable practice jurisdiction.

Freight inspections by TIA and MDT are used by shippers and carriers, along with other inspections and other information, in resolving loss and damage claims. Under the Act, we have no jurisdiction to decide loss and damage claims; that authority resides in the courts. We do have the authority to issue loss and damage claims processing rules, and rules governing claims processing have been published at 49 C.F.R. Part 1005. *See Loss and Damage Claims*, 340 I.C.C. 515, 539 (1972). But our loss and damage rules, while they establish the type of documentation required and set time limits within which a carrier must acknowledge, investigate, and dispose of claims, do not tell carriers how to investigate a claim, and they certainly do not seek to influence the ultimate disposition of a claim.

Here, the ALJ found that Conrail's complicity in the inspection agencies' practices bogged down the process, thereby increasing the costs for all involved. That finding, however, even if correct, at a minimum stretches the limits of our authority. The statute does not tell us to prescribe how carriers should investigate loss and damage claims, and our regulations establish only procedural requirements. And the challenged practices had at most a minimal impact on the

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of undercharges).

rates paid[48] or the recovery obtained. Indeed, it is clear from the record that Conrail did not make these reports, accurate or not, the unqualified basis for determining liability. Rather, the evidence indicates that Conrail often paid claims regardless of what the TIA reports indicated. Thus, we see no basis on which to revoke the exemption on the basis of unreasonable practices with respect to the inspection agencies.

II. REVOCATION OF SANTA FE'S EXEMPTION

Petitioners appeal from the finding in the initial decision declining to revoke the exemptions as to Santa Fe. According to petitioners, the ALJ properly concluded that Santa Fe imposed a discriminatory surcharge on them without justification and without a valid business purpose. They also argue that Santa Fe conspired with Conrail to harm petitioners, and that the two carriers improperly invoked the "attorney-client" privilege to withhold an explanation of joint discussions between their attorneys. Petitioners argue that, whether or not alternative transportation exists, the ALJ should have subjected Santa Fe to reregulation, and ordered that the surcharge be canceled.

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[48] In light of the fact that rates have not even been challenged as unreasonable, we doubt that we would have jurisdiction to find an unreasonable practice on the basis of the impact on rate levels. *See Union Pacific R.R. Co. v. ICC*, 867 F.2d 646 (D.C.Cir.1989).

Santa Fe responds that the ALJ's finding that it lacks market power was correct and disposes of the petition to revoke as to it, because a showing of potential abuse of market power is a prerequisite to revocation.[49] Santa Fe notes evidence in the record that it faces viable, cost effective intramodal competition from the Southern Pacific Transportation Company and the Union Pacific Railroad Company, negating any possible conclusion of competitive harm to petitioners; that from 1986-1989 it participated in less than seven percent of all rail carloads of potatoes destined to Kingsbridge; and that it does not serve Idaho or handle any Idaho potatoes for petitioners.

Santa Fe argues further that it has not unlawfully discriminated against petitioners. According to Santa Fe, its rates to eastern destinations other than Kingsbridge apply to different routes. Santa Fe adds that differing transportation circumstances here, i.e., significant differences in costs due to higher freight loss and damage claim payments on petitioners' traffic,[50] warrant the rate differential. Thus, Santa Fe contends that 49 U.S.C. § 10741 is inapplicable

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[49] In support, Santa Fe cites *Brae Corp. v. United States*, 740 F.2d 1023, 1043 (D.C.Cir.1984); and *G. & T. Terminal, supra*, 830 F.2d at 1235.

[50] According to Santa Fe, the additional transportation cost of $704 per car on shipments destined to Kingsbridge more than justifies the carrier's $500 per car surcharge.

here and, as a matter of law, no unreasonable or unlawful discrimination has resulted from its rate action.

Finally, Santa Fe argues that petitioners' "conspiracy" theory is frivolous. Santa Fe concedes that there were telephone conversations between Santa Fe and Conrail attorneys pertaining to joint legal strategy in defense of petitioners' claims after Santa Fe had been added as a party to the proceeding. But Santa Fe contends that this is a matter clearly within the attorney work product privilege (not the attorney-client privilege as erroneously stated by petitioners and in the ID). It adds that it independently determined, without consulting Conrail or any other rail carrier; that a Santa Fe rate increase was necessary due to high claims costs, and that the telephone conversations cited by petitioners occurred after Santa Fe imposed its surcharge.

We reject the ALJ's conclusion that Santa Fe's surcharge unreasonably discriminates against petitioners. Since we agree that Santa Fe lacks market power over petitioners' traffic, we affirm his determination not to revoke the exemption.[51]

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[51] We also find no evidence supporting petitioners' allegation that Santa Fe "conspired" with Conrail to impose surcharges on petitioners to punish them for exercising their claims rights and to put them out of business. Indeed, perhaps the most telling fact indicating the lack of a conspiracy is that while Conrail's surcharge went into effect in June 1983, Santa Fe did not impose its surcharge until 6

1. *Discrimination.* Petitioners' discrimination allegations against Santa Fe present, in principle, the same issues raised in regard to Conrail--whether "different conditions" exist, based on a uniquely high number of claims and on the substantial costs resulting from claims payments and related expenses, to warrant the surcharge. However, in the case of Santa Fe, the conclusion that no unjust or unreasonable discrimination would have existed had the traffic been regulated is even clearer. Santa Fe imposed its $500 surcharge on petitioners in June 1989, based on claims activity for the years 1986 through 1988. As discussed previously in regard to Conrail, the various legitimate costs to Santa Fe associated with serving the Spinale petitioners (of approximately $899 per car versus approximately $195 per car for other receivers) is sufficient to justify Santa Fe's rate action.[52] We note, moreover, that because Santa Fe,

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years later--a fact hardly consistent with any conspiracy theory.

[52] These figures come from the following table taken from the verified statement of Mary K. Harwood, at 3-4, in the reply statement of Santa Fe.

unlike Conrail, is not involved in the unreasonable practice portion of this case involving the eastern inspection agencies, there is not even a claim that Santa Fe's own behavior may have improperly contributed to any of those increased costs. Additionally, as in Conrail's case, petitioners have failed to demonstrate that the Santa Fe surcharge applies over the same routes as the movements to "advantaged" shippers who do not incur the surcharge, a necessary showing for a finding of discrimination under 49 U.S.C. § 10741(f).

Claims Activity of G & T with Santa Fe Railroad

Item		
Receivers	*Petitioners*	*Other*
% cars on which loss and damage claims were filed	69.5%	21.9%
% of revenue accounted for by claims	96%	23%
% of gross revenue actually used to pay claims	22%	4%
cost per car to Santa Fe of claims paid	$899	$195

2. *Market Power.* We agree with the ALJ that Santa Fe exerts no market power over the traffic in issue. As found by the ALJ and supported by Santa Fe's statements in reply to petitioners' appeal, Santa Fe is just one of a number of carriers that compete for, and originate, west coast potato traffic destined to New York City area receivers in conjunction with Conrail. We note further that it is a "minor player" in the movement of potatoes to Kingsbridge and originates no shipments in Idaho. For these reasons we find, as did the ALJ, that Santa Fe does not exert market power over petitioners' traffic, and that a balancing of the various NRTP factors, many of which are promoted by this exemption,[53] does not warrant revocation and reregulation here.

III. THE TIA APPEAL

TIA appeals the ALJ's finding that its personnel slanted reports in Conrail's favor. Our focus in this proceeding, however, is on assessing the behavior of Conrail and Santa Fe--carriers subject to the Commission's jurisdiction and regulation and the parties in this proceeding actually subject to the request for relief by petitioners. TIA was allowed to intervene on appeal in the interests of compiling the most complete record possible, but it is not an entity regulated by this Commission. As previously discussed, and without reliance on TIA's filing, the record

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[53] *See, e.g.*, 49 U.S.C. § 10101a(1), (2), and (4).

demonstrates that Conrail's appeal should be granted and that petitioners' request for revocation should be denied. Thus, we find no need to, and we will not, address further TIA's alleged misconduct or the arguments and issues raised by TIA in its appeal. Accordingly, we will dismiss the TIA appeal. In doing so, however, we neither affirm nor embrace any of the ALJ's findings regarding TIA other than as set forth earlier in this decision.

CONCLUSION

This case has raised some hard questions. When we exempted this traffic we thought that deregulation would benefit both the carriers and the shipping public. Carriers are generally satisfied with deregulation, and the evidence in this proceeding indicates that overall, shippers' experience with the exemption has been excellent. *See* testimony of the Idaho Grower Shippers Association and the Northwest Perishable Shippers Cooperative Association. Petitioners' experience, however, has not been as favorable.

Both sides in this case are tough businesses. Petitioners freely use the legal system, as citizens are allowed to do. Conrail seeks compensation for being the subject of petitioners' legal claims, which, at least facially, it should be allowed to do. Other alleged tactics of the parties, if they are indeed used, may be less legitimate. If petitioners' claims about some of Conrail's actions are true, and if Conrail's charges about petitioners (see the ALJ's ID

at 43-44) are true, then both sides have engaged in questionable activities.

But taken in perspective, none of that changes our basic focus here. Nearly a decade ago we exempted this traffic because we thought that regulation was not necessary and because it appeared to us that, in this competitive market, shippers and railroads were capable of protecting themselves from market abuses. We take seriously our role of protecting shippers from abuses of market power, but because Conrail barely recovers its variable costs of doing business in this market, we see no basis on which to find that it has or abuses market power. Absent such a finding, we do not see that our intervention in this matter is required or appropriate.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

COMMISSIONER SIMMONS, dissenting:

I view the actions of the rail carrier in this case somewhat more seriously than the majority. It seems to me that Conrail has engaged in behavior, albeit under our exemption, which clearly violates Commission rules. This carrier acquiesced in, and possibly encouraged the preparation of misleading inspection reports by inspection agencies. Therefore, I would have revoked the exemption to

the extent necessary to oversee Conrail's claims inspection activities to prevent these abuses in the future.

It is ordered:

1. The appeal of Consolidated Rail Corporation is granted as discussed above.

2. The appeal of petitioners is denied.

3. The appeal of the Transportation Inspection Agency, Inc. is dismissed.

4. The initial decision of the Administrative Law Judge in this proceeding, served February 13, 1991, to the extent inconsistent with this decision, is vacated and set aside.

5. This decision is effective on July 24, 1992.

By the Commission, Chairman Philbin, Vice Chairman McDonald, Commissioners Simmons, Phillips, and Emmett.

Sidney L. Strickland, Jr.
Secretary

(SEAL)

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EX PARTE NO. 346 (SUB-NO. 14A)

RAIL GENERAL EXEMPTION AUTHORITY --MISCELLANEOUS AGRICULTURAL COMMODITIES--PETITION OF G. &. T. TERMINAL PACKAGING CO., INC., ET AL. TO REVOKE CONRAIL EXEMPTION

Decided February 8, 1991

By Paul S. Cross, Administrative Law Judge

By petition filed July 18, 1988, G. &. T. Terminal Packaging Co., Inc. (G. & T.), Mr. Sprout Inc. (Mr. Sprout), Tray Wrap, Inc. (Tray Wrap), and Country Wide Produce, Inc. (Country Wide) (Collectively referred to herein as petitioners) ask the Interstate Commerce Commission to revoke an exemption from Commission regulation of rail transportation of potatoes, tomatoes and Brussels sprouts as it applies to shipments moving via Consolidated Rail Corporation (Conrail) to petitioners' facilities at Kingsbridge, Bronx, New York, NY. On June 17, 1989, petitioners amended their petition adding the Atchison, Topeka and Santa Fe Railway Company (Santa Fe)

as a defendant. By Commission decision of August 3, 1989, Santa Fe was joined as a party.

INTRODUCTION

To some extent the background and factual history of this complex proceeding is set forth in Consolidated Rail Corp.--Declaratory Order--Exemption, 1 I.C.C.2d 895 (896); G. &. T. Terminal Packaging Co., Inc. et al. v. Consolidated Rail Corporation, 830 F.2d 1230 (3rd Cir.1987); and G. &. T. Terminal Packaging Co., Inc. et al. v. Consolidated Rail Corporation, 646 F.Supp. 511 (D.N.J.1986). The last two cited cases sometimes are referred to as the New Jersey litigation.

At issue is Conrail's decision in June 1983 to impose a surcharge of between $500.00 and $600.00 per car on shipments of the named commodities to petitioners. The Commission, by rule, declares that these shipments are exempt from rate regulation under the exemption provisions of the Interstate Commerce Act pursuant to 49 U.S.C. § 10505. See Rail Exemption Authority--Miscellaneous Agricultural Commodities, 367 ICC 298 (1983) codified at 49 C.F.R. § 1039.10. In addition, the subject movements are exempt from Commission rate regulation under the so-called boxcar provisions of 49 C.F.R. § 1039.14, which again are rules established by the Commission. The existence of the dual Commission ratemaking exemptions are not material herein. Both are Commission conferred and may be

revoked for cause. Conrail's surcharge was imposed because petitioners file claims against Conrail for loss and damage. Petitioners argue that the rates of Conrail are discriminatory because they apply to no one else.

Petitioners allege in their July 1988 petition that the Railroad Perishable Inspection Agency (RPIA) and the Merchants Dispatch Transportation Corporation (MDT) are engaged in a continuous practice of forcing their inspectors to structure or rewrite their reports to reflect inaccurate or incomplete inspection results. According to petitioners, this is done in an effort to limit or remove Conrail's responsibility for loss or damage to perishables and other products, with Conrail's knowledge and acquiescence, and is a false or fraudulent practice in addition to being discriminatory as applied against petitioners.

As noted, in the June 1989 amended petition, petitioners also contest Santa Fe's handling of their shipments of potatoes. Shipments originating in California on the Santa Fe are delivered to petitioners facilities at Kingsbridge by Conrail. On or about June 1989, Santa Fe increased G. &. T.'s freight rate to the latter's facility in the Bronx at Kingsbridge by $500.00 to $200.00 a car (from $6,600.00 to a maximum of $7,100.00 a car). This increase coupled with the then existing Conrail surcharge, results in a rate on shipments destined to petitioners' Kingsbridge facilities totaling as much as $1,100.00 higher than the rate to nearby Hunts Point where some of petitioners' Bronx

competitors are located. Petitioners charge that Santa Fe's actions are part of a joint effort by Santa Fe and Conrail to pressure petitioners to withdraw their revocation petition and to drive them out of business. Petitioners contend the conduct of the railroads constitutes unlawful discrimination under the Interstate Commerce Act (ICA or Act).

I *PROCEDURAL HISTORY*

A. *Establishment of Surcharge Against Petitioners*

Petitioner, G. &. T. is in the business of purchasing, repacking and wholesaling potatoes. G. &. T. maintains facilities not just at Kingsbridge but also at Hunts Point Market, another location in the Bronx. (Appendix to Appeal to the Third Circuit of the U.S. Court of Appeals in the New Jersey litigation which appendix is referenced herein as "NJA"). The facilities of G. &. T. at Hunts Point Market are not described in any detail insofar as I am aware.

Kingsbridge is approximately nine miles from the Hunts Point market and seven miles from the Conrail Oak Point Freight Yard (NJA). Petitioner, Mr. Sprout is a repacker and wholesaler of Brussels sprouts. Petitioner, Tray Wrap is a repacker and wholesaler of tomatoes. Petitioner, Country Wide purchases and sells for its own account and on consignment a variety of agricultural products. Anthony Spinale (Spinale) is the owner of G. &. T. and Mr. Sprout.

Tray Wrap is wholly owned by Ms. Mazie Faraci and Country Wide is wholly owned by Mr. Gary Speier.

These entities, as noted are receivers or repackers of perishable produce transported to them by rail and other modes from various points of origin within the United States. Petitioners purchase fresh vegetables and repack them into consumer-sized packages for sale to supermarket chain stores and other produce retailers and wholesalers in the metropolitan New York City area.

Anthony J. Spinale is the president and as noted, is the sole stockholder of G. &. T. and Mr. Sprout. He also is the overseer of Tray Wrap, and acts as its foreman. Country Wide was given by Mr. Spinale for no consideration to Gary Speier in 1978 (See Pets' Resp. to Conrail's First Set of Interrogatories, Nos. 13, 26). G. &. T., to some extent has purchased rail cars of potatoes from Country Wide rather than individually ordering such cars (Verified Statement of Conrail's witness Saperstone filed as Volume 5 of Conrail's Reply Statement of Facts and Argument dated February 23, 1990, which is short handed as Conrail, Vol. 5, V.S. Saperstone).

Another entity probably controlled by Mr. Spinale (not a petitioner here) is Produce Packaging Materials, Inc. Its president is a secretary employed by G. &. T. and its offices are located at the same address as G. &. T. (Conrail Vol. 1 at 4 n. 4). When Conrail notified petitioners that

Conrail's Rule 10 (as explained below) governing payment of detention and demurrage charges would be applied to their traffic, Mr. Spinale commenced ordering rail cars of potatoes in the name of Produce Packaging for the first time. Such potatoes were delivered to petitioners' facilities (Conrail Vol. 2, V.S. Roberts).

In May 1983, Conrail, after the deregulatory rulemaking action taken by the Commission in exempting agricultural commodities and box cars from Commission rate regulation, imposed a surcharge upon shipments to G. &. T., Mr. Sprout, and Tray Wrap. The precise amount of the surcharge is not clearly set forth by Conrail but from the outset it was at least $500.00 for each rail car shipment and in some instances was $600.00. The amount of Conrail's surcharge upon these petitioner companies has varied somewhat since May 1983 but it has never been less than $500.00 a rail car and has been as much as $794.00 (NJA 217; 219; 224A and 263).

After imposing the surcharge, Conrail did not directly inform petitioners that a surcharge had been imposed. Conrail also did not tell petitioners of the exact amount of the surcharge nor the precise reason for its action. Following Conrail's action, petitioners discussed the surcharge with Conrail in late June 1983. As a result of a meeting in Philadelphia, PA, Richard A. Mehley, General Attorney for Conrail, wrote to petitioners' counsel on June 30, 1989 stating that Conrail would reduce its portion of transportation

charges to $1,780 on each car moving from Chicago to petitioners' place of business at Kingsbridge which was an amount $100 above nearly Hunts Point, NY charges "provided G. &. T. agreed that it would not file unwarranted loss and damage claims." The $1,780 amount was $100 above Hunts Point charges.

Conrail's action was not surprise to petitioners. At the time of its creation on April 1, 1976, Conrail inherited litigation brought by the Penn Central Transportation Company against petitioners for $60,000 in outstanding freight charges. There also was litigation involving 328 freight loss and damage claims filed by petitioners against Penn Central in the amount of $2,168,562 (Conrail, Vol. 1, V.S. Hillenbrand at 2). Over the next three years, Conrail sued petitioners for an additional $235,000 in unpaid transportation charges, and petitioners asserted 333 more freight loss and damage claims against Conrail totalling an additional $2,000,000 (*id.*).

Through 1980 and early 1981, the parties endeavored to settle all litigation pending through 1979, and a settlement was reached in June, 1981 (Conrail, Vol. 4, V.S. Finnegan at 2).

After the settlement, Mr. Spinale's companies continued to experience loss and, thus, continued their loss and damage claims activity. In 1981, they filed a total of 251 claims against Conrail seeking approximately $2.3 million.

These companies' 1981 claims may be compared to the combined total for all other perishables shippers on Conrail's system of 117 claims amounting to just under $600,000 (Conrail, Vol. 1, V.S. D'Orlando at 4-5). During the period from July, 1979 to July, 1983, petitioners submitted a total of 544 more loss and damage claims, grouped in ten separate lawsuits, for over $4.5 million (*id.*). At some point in the early 1980's, petitioners filed loss and damage claims on virtually every rail car they received (*id.*)

Nonetheless, Conrail in effect insisted that petitioners surrender any rights they had under the Act to file claims seeking payment for damages caused to produce shipped to them in return for Conrail agreeing to eliminate most, but not all, of the added freight charge.

Indeed, after Conrail increased its revenue requirement for movements to petitioners' facility in 1983, petitioners for a time ceased filing loss and damage claims against Conrail, and began filing those claims against the rail carriers that originated the movements (*id.* at 6).

Nonetheless, Conrail was required to pay its pro rata share of any such claims paid by those originating carriers (Conrail, Vol. 1, V.S. O'Reilly at 3).

In 1983, petitioners stopped paying any detention and demurrage charges to Conrail. The total of all such charges

due and owing to Conrail as of February, 1990 approaches $2 million dollars (Conrail, Vol. 4, V.S. Sprows).

Petitioners argued then and continue to argue that Conrail, even though it was deregulated from the normal rate fixing procedures by the Commission rules, can not require petitioners to surrender their damage claim rights under the Act.

Petitioners, in furtherance of this position in resistance to Conrail, wrote a letter on September 30, 1983 to then Chairman of this Commission seeking to invoke the assistance of the Commission.

B. *Request of Petitioners to Commission for Assistance and Aftermath of Commission Rejection of Petitioners Request for Assistance.*

Petitioners' September 30, 1983 letter to the then Chairman outlines the surcharge action taken by Conrail. The letter indicates the possibility that petitioners would have to resort to legal proceedings. The letter states:

> "Before we can proceed in court, it must be determined whether the ICC has any remaining jurisdiction over the fixing of such freight rates by Conrail and our contention that the present rate applied to G. &. T. is discriminatory. G. &. T. is a captive of

> Conrail since there are no alternative methods by which it can obtain these products that are economically viable.
>
> I, therefore, requested determination from ICC as to whether it may have any remaining jurisdiction with regard to disputes of this nature. If this is possible, we would like to proceed in the appropriate manner before your Agency. If the ICC no longer has any jurisdiction at all with regard to the establishment of discriminatory freight rates under the circumstances indicated herein, I would appreciate a statement to that effect." (NJA-48)

Petitioners received a prompt reply from the Commission. On October 11, 1983, the then staff Director of the Office of Proceedings (DOP) responded on behalf of the then Chairman stating:

> "The Interstate Commerce Commission no longer exercises jurisdiction over the rates charged by the railroads for the movement of the commodities covered by the exemption or over the practices engaged in by the railroads in the course of transporting them. Because your client and its affiliates appear to deal only in products covered by the Agricultural

> Commodities Exemption, any dispute they may have with Conrail, or other railroads, would have to be settled in the courts rather than before the Commission." (NJA-49)

Petitioners' tried to obtain assistance through the offices of Congressman James J. Florio with regard to Conrail's surcharge.

By letter dated October 20, 1983, Conrail responded to Congressman Florio's inquiry concerning the surcharge through William B. Newman, Jr., Vice President and Washington Counsel of Conrail. (NJA-50) Mr. Newman's letter is enlightening in several respects. First, he explains Conrail's delay in answering "in the hope that our in-depth analysis of the rail service provided G. &. T. and other similar shippers in the New York and Boston areas would be completed, but it appears that the study will not be available for at least another month."

Newman's letter states that a "study" was being completed in 1983 but concedes that no study was in existence when the surcharge was imposed. In fact a 1983 "study" is not produced by Conrail. Beyond question, there was no "studied" cost predicate for the surcharge at the time of its imposition by Conrail.

Mr. Newman goes on to allege that Conrail has found "most of G. &. T.'s damage claims either are spurious or grossly exaggerated."

However, none of petitioner's claims are found by any court to be spurious or grossly exaggerated. In fact, the disputed claims, except possibly one, are not even been decided by a court.

Newman also stated in support of Conrail's surcharge:

> "*** the increases in G. &. T.'s rail transportation charges are predicated upon the additional costs that Conrail has incurred as a result of G. &. T.'s practice of filing unjustified and exaggerated damage claims." (NJA-51)

C. *Action Against Conrail in New Jersey Federal District Court*

As a result of the Commission's initial responses that it lacks jurisdiction and further upon Conrail's refusal to remove or adjust its surcharge unless petitioners surrender their claim rights, petitioners brought suit against Conrail on March 26, 1984 in the U.S. District Court for the District of New Jersey. G. &. T. et al. v. Conrail, Civ. No. 84-1173,

which as noted is sometimes referred to herein as the New Jersey litigation.

Plaintiffs sought a preliminary injunction from the District Court to prevent Conrail from continuing to impose the surcharge (NJA-83) and also moved for summary judgment on the ground that the surcharge violated plaintiffs' rights to pursue claims under the Act as well as plaintiffs' common law rights. Conrail cross-filed for summary judgment. (NJA-129) This suit was filed about a year after Conrail imposed its surcharge on shipments to petitioners' facility. G. &. T. alleged that Conrail's act of increasing its revenue requirement violates the Sherman Act, the Interstate Commerce Act, the U.S. Constitution and the common law. The court dismissed plaintiffs' Sherman Act, Interstate Commerce Act, and Constitutional claims, but permitted discovery to proceed on the common law claim (Conrail, Vol. 1 at 10).

The court denied petitioners' request for a preliminary injunction against collection of the increased revenue requirement because it found that "Mr. Spinale's testimony that G. &. T. would be insolvent in six months time [was not] credible. *G. &. T. Terminal Packaging v. Conrail*, Slip Op. at 10, 84-1173 (D.N.J. September 7, 1984) (Conrail Vol. 1 at 10).

On September 7, 1984, the Judge Harold A. Ackerman, as noted denied plaintiffs' motion for a

preliminary injunction (NJA-151). On September 24, 1984, Judge Ackerman denied plaintiffs' motion for summary judgment and partially granted Conrail's request for summary judgment that is with regard to plaintiffs' (petitioners') claims for relief under the Act, specifically 49 U.S.C. §§ 10741 (discrimination) and 11707 (damage claims) (NJA-163). However, the court made no substantive findings concerning discrimination under the Act. With regard to plaintiffs' claim as to remedies under the common law, the court held that plaintiffs' rights under the common law are not precluded by Federal law and denied Conrail's motion for summary judgment as to plaintiffs' claims under the common law (NJA-176). The opinion further noted that there were numerous issues of fact material to a determination of the correctness of the rate imposed by the defendant and directed the parties to proceed with discovery (NJA-177).

Conrail filed a motion for reconsideration and reargument of the Federal District Court decision of September 24, 1984 (NJA-179).

In February, 1985, Conrail also filed a motion for summary judgment as to Count VI of the complaint. This Count raised issues of constitutional law. On April 8, 1985, Judge Ackerman addressed and decided Conrail's motions for reconsideration and for dismissal of Count VI. He denied Conrail's motion for reconsideration. In an extensive opinion, Judge Ackerman states:

> *** Neither the primary or the exclusivity of the ICC's jurisdiction or the generally preemptive effect of the Staggers' Act regarding state regulation of rate setting preclude G. &. T. Terminal Packaging from pursuing its common law claims in this court. (NJA-199)

However, the court granted Conrail's motion to dismiss Count VI of the complaint relating to plaintiffs' argument of constitutional law without prejudice to plaintiffs' right to renew (NJA-199-200).

Petitioners and Conrail proceeded with extensive discovery.

A pretrial conference was held on September 20, 1985 and the case was ready to proceed to trial.

D. *Conrail Application to the Commission--September 27, 1985*

Immediately after the September 20, 1985 pretrial conference, Conrail filed a petition on September 27, 1985, with this Commission requesting the commencement of a declaratory order proceeding. Conrail also sought the issuance of a declaratory order "that all common law remedies with respect to railroad rates and conditions of

service are preempted by the Act notwithstanding the exemption granted under Sec. 10505***"

In response to the petition of Conrail, the Commission issued a declaratory order finding that the Commission retains exclusive jurisdiction over petitioners' discrimination claims, even though the affected movements are exempt from regulation. The Commission further found that common law remedies are preempted in view of ICC jurisdiction. Finally, the Commission found that petitioners must satisfy the statutory criteria for revocation of the applicable exemptions before the Commission can entertain claims under the provisions of the Interstate Commerce Act. Consolidated Rail Corporation--Declaratory Order--Exemption, 1 ICC2d 895 (1986) (Exemption Decision).

Thus, the Commission on February 27, 1986 issued an interpretive decision which concludes that it retains jurisdiction over matters exempted under s10505. Under the Commission's finding, as a matter of law, there is no surviving common law cause of action. 1 ICC2d 895. This decision notes that such findings are contrary to Mr. Hardy's prior letter of Commission staff but concludes that staff does not speak for the Commission. Conrail's request for the institution of a declaratory proceeding, thus, was denied because such a proceeding was "unwarranted at this point." The Commission stated that G. &. T. could file such a request if G. &. T. wished to do so (NJA-30).

E. *Decision in N.J. Litigation*

On April 25, 1986, Conrail filed a motion with the District Court for summary judgment and sought dismissal of plaintiffs' complaint (NJA-206). Conrail, in its motion for summary judgment, requested the District Court, to reconsider the same issues that had been considered and ruled upon by Judge Ackerman in September 1984 and April 1985 (NJA-206).

Plaintiffs' in May 1986 filed a cross-motion to restore Counts III and IV of the Complaint which related to plaintiffs' rights under the Act (NJA-208).

The hearing on Conrail's motion and plaintiffs' cross-motion was rescheduled several times. It eventually was set down for argument on July 28, 1986. On July 16, 1986, the matter was reassigned from Judge Ackerman to the Honorable Alfred J. Lechner (NJA-266).

Conrail's motion for summary judgment and plaintiffs' cross-motion were argued on October 20, 1986. In an opinion dated October 23, 1986, Judge Lechner granted Conrail's motion to dismiss G. &. T.'s common law claim of rate discrimination and denied G. &. T.'s motion to restore its claims for relief before the Court, 646 F.Supp. 511 (D.N.J.1986).

Stated differently, in light of the Commission's order, the District Court dismissed petitioners' remaining common law claims. The United States Court of Appeals for the Third Circuit affirmed the District Court's decision in all respects. G. &. T. Terminal Packaging Company v. Conrail, 646 F.Supp. 511 (D.N.J.1986), aff'd, 830 F.2d 1230 (1987), cert denied, 108 S.Ct. 1291 (1988). It also rejected petitioners' argument that Conrail's surcharge violates petitioners' right to file loss and damage claims under 49 U.S.C. § 11707.

Contemporaneously, the United States District Court for the Southern District of New York dismissed an antitrust suit that petitioner Country Wide brought against the Southern Pacific (alleging that the June 1983 increase in through rates to petitioners was a result of monopolistic conduct by SP and Conrail). The court held that the claim was "simply incompetent" and had been commenced "without reasonable basis". Country Wide Produce v. Southern Pacific Transportation Company, 87 Civ. 4992 (S.D.N.Y. September 1, 1988) (Conrail Reply Vol. 1 at 12).

Thus, as can be seen, issues relating to common law, antitrust, and constitutional remedies are not appropriate in this Commission proceeding. However, no court has passed upon the issues of discrimination and unreasonable practice raised by petitioners.

F. *Court Proceedings Against RPLA and MDT*

The petitioner companies (except County Wide) also brought separate Court proceedings against the Railroad Perishable Inspection Agency ("RPLA") and the Merchants Dispatch Transportation Co. ("MDT"), which are railroad controlled inspection agencies. The RPIA litigation before the Supreme Court--New York County in No. 14383/83-002 (hereinafter sometimes referred to as the "RPIA Litigation," was dismissed on defendant's motion for summary judgment. There was no formal hearing concerning the petitioners' allegations that these agencies had written false and fraudulent reports. The Court summarily concluded in terms of a tort action for fraud, that since the RPIA was the railroad's inspection agency, the inspection agency had a duty to the railroads, not to plaintiffs (petitioners here). The court also held preemptively that the plaintiffs fail to establish the particular facts necessary to prove civil fraud. The Court summarily concluded that the plaintiffs are unable to prove that RPIA altered any particular report so as to produce a fraudulent conclusion in terms of civil tort law. The court importantly further held that the plaintiffs (petitioners) do not rely on the RPIA reports, because they can and do resort at their expense to United States Department of Agriculture inspectors.

Petitioners' separate action against MDT, in this instance in New Jersey before a Federal court under a diversity suit also was adverse. Upon a motion for summary judgment the Court dismissed the suit. Among other things,

the dismissal was based upon res judicata and the failure of the plaintiffs' to include their charges against MDT in the G. &. T. litigation against Conrail. There was no decision in the matter concerning petitioners' complaint of railroad discrimination or unreasonable practice under the ICA and there is no res judicata as to these ICC issues. See Mr. Sprout, Inc., Et Al. v. Merchants Dispatch Transportation Corp. U.S. District Court for the District of New Jersey, Civil Action No. 87-1574, decided March 2, 1988.

G. *1988 Petition by G. &. T. et al. Before the Interstate Commerce Commission*

Following the conclusion of the New Jersey judicial proceedings, Congressman Florio on behalf of petitioners contacted the ICC concerning the ICC's jurisdiction with regard to petitioners' complaints against Conrail. The then Chairman responded to Congressman Florio by letter dated April 4, 1988 stating in part:

> "Such a petition should be designed to show that regulation is necessary to prevent conduct that would, in the absence of the exemption be unlawful under the Interstate Commerce Act. Thus, the Commission has never had the opportunity to review all the facts concerning this dispute.

> No petitions to revoke this exemption have ever been filed by any interested person. Given this, and G. &. T.'s failure to use the available process. I must disagree with any inference that the revocation remedy is not meaningful or that we would not give a shipper's request for revocation a full and fair hearing. We stand ready to review Conrail's treatment of G. &. T. should G. &. T. bring the matter before us, and are prepared to impose appropriate remedies if a record of abuse is demonstrated. To date, however, the merits of this dispute have not been presented to the Commission by G. &. T."

On July 15, 1988, G. &. T., Tray-Wrap, Mr. Sprout and Country Wide filed the present petition with the Commission seeking to revoke in whole or in part the exemption of Conrail from regulation of rail transportation of potatoes, tomatoes and Brussels sprouts previously exempted and for certain other relief. Country Wide joined as a petitioner because it also was required to pay the surcharge on shipments that it purchased and then sold to G. &. T. Country Wide because it files few if any claims, argues that it can not be "guilty" of filing "excessive and spurious claims."

Conrail, after several motions, filed its response and a motion to dismiss on October 6, 1988. Conrail, however,

did not reply to petitioners' allegations, paragraph by paragraph and did not file affidavits in support of its general factual denials of petitioners' allegations. It chose instead to submit a brief to support its motion that the Commission dismiss the petition.

The Commission in a decision of December 17, 1988, denied Conrail's motion to dismiss and granted petitioners' request to conduct limited discovery. The decision states in part:

> "Petitioners' argue that regulation is necessary to prevent Conrail from engaging in unlawful discrimination and possible other unlawful acts or unreasonable practices. Petitioners should be given an opportunity to prove their allegations by submitting evidence to support them."

Following the December 17, 1988 decision, Conrail objected to petitioners' request to take depositions. A decision of the Commission on April 17, 1989, concerning petitioners' request to take depositions, states in part:

> "Conrail also argues that the information sought from deponents regarding fraud and freight loss and damage claims is irrelevant because this revocation proceeding should turn on issues such as market definition,

> monopoly power, anticompetitive conduct and rate discrimination--matters on which the deponents would have no information. Conrail is incorrect. If petitioners succeed in any of their litigation or prove here (subject to the res judicata constraint) that Conrail conspired to have loss and damage claims altered, then based its increased charges on these claims, this fact could support a finding of unlawfulness under the Interstate Commerce Act. See decision in this proceeding served on January 4, 1989, at p. 2. Such a finding, in turn, could be grounds for revocation of the exemption on the theory that petitioners have shown they were subject to abuse and are entitled to the remedies available under regulation."

The decision served September 11, 1989, granted petitioners request to take limited depositions.

Petitioners amended their petition in several respects. In April 1989, Conrail threatened to embargo all freight traffic to petitioners unless petitioners paid all outstanding disputed detention and demurrage charges or posted security. Petitioners contended Conrail's action was part of a continuing pattern of discrimination and was not a legitimate business demand but an effort to further harass and intimidate petitioners because of their dispute with Conrail.

By decision dated June 13, 1989, petitioners were granted authority to amend their petition to include the demurrage charge matter. Also, as previously noted, in a decision of August 3, 1989, the Commission granted petitioners' request to amend their revocation of exemption petition to include the actions of Santa Fe.

II. *STATEMENT OF FACTS*

A. *Initiation of Surcharge and Overview*

Conrail, in May 1983, without notice or discussion with plaintiffs, imposed a surcharge on plaintiff G. &. T. and two other companies which Conrail shows are controlled by Anthony Spinale; Mr. Sprout and Tray Wrap (NJA 214; NJA 54 - 55) During that month Conrail notified connecting western rail carriers that shipments to the New York City area would provide for an added charge of $500.00 to $600.00 per car on shipments destined for Kingsbridge, Bronx, New York City. In other words, shipments to Kingsbridge, which had heretofore been charged the same rate as nearby Hunts Point, now would be charged an additional amount. Primarily, the companies that receive commodities at Kingsbridge, which is approximately nine miles from Hunts Point, are G. &. T., Mr. Sprout and Tray Wrap (See Conrail Maps, NJA 209, 210). On occasion, Produce Packing Materials, Inc. ("Produce Packing") also receives cars, as has County Wide which is friendly to petitioners.

The surcharge, however, is not limited only to shipments received by petitioners at Kingsbridge (NJA 319 - 320). A Conrail telegram to the Atchison, Topeka & Santa Fe railroad (AT & SF RR) states:

> "This is to advise Kings Bridge, N.Y. receivers, i.e., G. &. T. Terminal Packaging Co.; Tray Wrap Inc. and Mr. Sprout Inc., may also do business at other Conrail served points, therefore, effective June 15, 1983, on shipments billed to those doing business as G. &. T. Terminal Packaging Co., Tray Wrap Inc. and Mr. Sprout, Inc. to any destinations on Conrail, there will be an additional charge payable to Conrail of $500 per car above the required Conrail proportion established to that point. It is also to be understood each car billed to these consignees will be handled in a manner in which Conrail is advised by wire of the expected handling of said car prior to car's actual receipt at junction with Conrail. (NJA 217) (Emphasis Added)

Similar telegrams were sent to all other western rail carriers making it clear that Conrail imposes an additional charge of $500.00 to $600.00 on G. &. T., Tray-Wrap or Mr. Sprout at any Conrail location (NJA 219, 220). The telegrams also specify that the surcharge is not only

applicable to these companies but also "to such concerns doing business under any other name" (NJA 224a). The surcharge is for the exclusive benefit of Conrail and not shared with connecting carriers (NJA 55).

Prior to the imposition of the surcharge, G. &. T. was the largest receiver of potatoes by rail in the Hunts Point Market area. G. &. T. was the area's leading supplier of idaho potatoes (NJA 85, NJA 393; Grappel 1989 Tr. 20). From 1980 through 1983 G. &. T. received more than 400 freight cars of potatoes annually (NJA 86).

Because of the distance, cost and volume, the only competitive means of transportation for potatoes from the western states of idaho, California and Oregon to the New York City area is by rail (NJA 85 - 86; See also Spinale and Grappel statements, Infra). Conrail's own information indicates that most western potatoes are produced in idaho and that all but an insignificant amount of these potatoes are shipped to the east to the New York City area by rail (NJA 274 - 275). There is a significant difference to the consumer between potatoes grown in idaho and the potatoes available from the east. Although Conrail argues that an idaho potato as a Russet potato is not a distinctive commodity, the evidence establishes that idaho potatoes carry their own identity in the market and that other potatoes do not compare. If as it often happens, the retail buyer wants an idaho potato, such must be provided. In this regard, even if all Russet potatoes, which they are not, are fungible in an

edible sense, the idaho potato has a distinctive niche in the market place. Mr. Grappel a potato buyer in New York City emphasizes that the state of idaho had done a "tremendous job with their Russet baking potato" (10/26/89 dep., p. 21). In his words:

> All the other states are trying to imitate them, but an idaho is still an idaho. (If Waldbaum's wants idaho's) "I can't buy Russet baking. I got to buy idaho Russet baking. There is a difference." (10/26/1989 dep., p. 21).

This testimony is confirmed by Mr. Spinale (NJA 401-403). G. &. T. can not avoid the effects of higher shipping costs for idaho potatoes by substituting eastern potatoes that can be delivered by truck (NJA 393).

Conrail disputes petitioners contention that there is no reasonable transportation alternative to rail transportation of western potatoes to the New York City area. As has been noted, the majority of the potatoes from idaho in 1983 were shipped east by rail to New York City according to Conrail's own document (NJA 274-275). Nevertheless, Conrail provides a report by Professor Casavant who offers an opinion that there are viable transportation alternatives to rail. A review of the Casavant report indicates that the data relied upon by Conrail's expert supports Petitioners' contention that non rail alternatives would cost more than

petitioners would have to pay for rail shipments even with the surcharge included.

Table 16 of Professor Casavant's report indicates that the price differential between the Hunts Point rail price and the truck delivery price to Kingsbridge is at least $1 per hundred pounds of potatoes. Petitioners point out that a rail car contains approximately 1,200 to 1,300 sacks of potatoes. Assuming that Conrail's estimate of the additional cost is as little as a $1 per bag, the additional cost for delivery of potatoes to Kingsbridge would amount to $1,200 to $1,300 above the rail cost. Because G. &. T. purchased as many as 400 rail cars of western potatoes per year, the use of alternatives transportation services would require G. &. T. to absorb or pass on approximately $500,000 in higher transportation cost. If petitioners' contentions are accepted, this cost could be even higher. This differential would cause G. &. T. to pay about 20% more in transportation cost than its competitors. Thus, the cost of alternative transportation is greater than present rail costs including the surcharge.

As a result of the surcharge, Mr. Spinale testifies that G. &. T. is forced to pass along this additional cost which results in G. &. T.'s prices being higher (NJA 398-400). This higher charge as stated by Mr. Spinale G. &. T. results in a substantial loss of business and customers with regard to the sale of idaho and other western potatoes (NJA 395 - 400). Moreover, the problem of higher shipping costs is now even worse for G. &. T. because Conrail, after May 1983,

increased the surcharge for the shipment of western potatoes to $773.00 and eventually $794.00 per freight car (NJA 263). This surcharge increase is imposed even though G. &. T. reduces the amount of claims filed against Conrail after September 1983 is substantially reduced (NJA 264).

Notwithstanding, in 1986 petitioners continued to file loss and damage claims directly with Conrail and also continued to file claims against Conrail's connections. In 1988, petitioners filed 60% of all claims filed by potato receivers on the Conrail system, while receiving only 5% of potato carloads delivered by Conrail (Conrail, Vol. 1, V.S. O'Reilly at 3).

In 1989, over 50% of freight loss and damage claims filed by potato receivers on the Conrail system were filed by petitioners, even though petitioners still received only about 5% of potato deliveries (id.).

Conrail's connecting carriers have similar claims experience with petitioners. Between 1984 and 1987, petitioners filed 65% to 80% of the freight loss and damage claims against Union Pacific Railroad (UP) from potato receivers located in the New York metropolitan area. Petitioners accounted for less than 10% of UP's potato traffic delivered to that area (Conrail, Vol. 1, V.S. O'Reilly at 3); but for reasons not explained, UP imposes no surcharge on petitioners.

Between 1986-88, Santa Fe received claims from G. &. T. alone (not the other petitioners) on 65% of cars delivered to G. &. T., and paid $899.00 per car in claims to G. &. T. versus an average of $195.00 per car in paid claims for other of Santa Fe's perishable receivers (Reply Statement of Facts and Argument of Santa Fe, filed February 22, 1990 (V.S. Harwood at 3-4). The cost of processing these claims was around $200.00, not counting the damage. Most claims are paid by Santa Fe and apparently Santa Fe concedes that the claims are valid.

From 1984 through 1989, G. &. T. accounted for about 50% of all claims filed with the Southern Pacific Railroad (SP) on potato traffic destined to New York and New Jersey. In some years, G. &. T. filed as much as 67% of such claims, and one year it filed 83% of such claims (Conrail, Vol. 1, V.S. M. Koerpel). Nevertheless, SP does not impose a surcharge on petitioners.

Shippers and shipper associations experience claims filed by Mr. Spinale's companies. As a result, some refuse to do business with his companies, or place conditions on their willingness to deal with his companies (Conrail, Vol. 2, V.S. Stanger, V.S. Searle, V.S. Wilcox, V.S. Driscoll, and V.S. Skogen).

The loss and damage cases filed by petitioners against Conrail are not progressed to trial. The only case gone to

judgment, at Conrail's behest, was dismissed (Conrail, Vol. 1 at 7).

Conrail's original argument in support of the surcharge on petitioners was based on the allegation that they filed "excessive and spurious" claims. This allegation is unsupported. In fact, during discovery in the New Jersey case, petitioners obtained after-the-fact surcharge studies prepared by Conrail which establish the claims filed by petitioners have a relatively minor average per claim processing cost in comparison to the average amount of claims should they be paid. Moreover, most claims are paid.

B. *Conrail Cost "Studies"*

Before imposing the freight surcharge on petitioners in June 1983, Conrail held a meeting of its employees. Conrail representatives directed Jack Kurt, Conrail Manager of Damage Prevention. Perishable- Damage Prevention Services Department, to identify costs unique to "Spinale's" companies (Kurt deposition, 3/11/85, Tr., P. 38-7 to 39-24). The result of the Kurt study was turned over to Jeffrey Elliott, Line of Business Unit Manager of Conrail who fixed the amount of the surcharge to be imposed on G. &. T.

According to Mr. Kurt, the December 1982 meeting was initiated by John D'Orlando, (NJA 345). D'Orlando's title was "Manager of Freight Claims Litigation for

Control". (NJA 135) Mr. D'Orlando's responsibility was to oversee the handling and the investigation and disposition of claims on perishables.

Mr. Kurt states that Mr. D'Orlando requested Mr. Elliott "to investigate the G. &. T. problem that Conrail was having" (NJA 344). Mr. Elliott also states that the investigation conducted with regard to G. &. T., Mr. Sprout and Tray Wrap was initiated by the claims department which "asked us to look at the customer and see if there *** was any basis *** for increasing the charge" (NJA 283).

Further details as to the exact basis for the 1983 surcharge of Conrail are not available. Conrail claims privilege because counsel was in attendance (NJA 347).

Jack Kurt

Mr. Kurt mentions a report he prepared for Conrail in his affidavit dated April 16, 1984 submitted by Conrail to the New Jersey Federal District Court in opposition to plaintiffs' motions for a preliminary injunction and summary judgment. Although this report is referred to by Mr. Kurt in his affidavit, it was not submitted to the District Court (NJA 147). It was later obtained by petitioners during discovery (NJA 244).

The Kurt report, prepared in 1982, set forth its purpose as follows:

> Explore opportunity to embargo rail traffic to G. &. T. Terminal Packaging Company. (Emphasis added) (NJA 244)

Kurt testifies his use of the term "embargo" reflect his understanding that Conrail was considering the possibility of cutting off all rail service to G. & T. (May 6, 1985 deposition Tr. p. 7 and 8).

Kurt also made notes of a conversation with Conrail's counsel, Kenneth Fremont, Esq. in which he, Kurt, was advised to "solve the problem--get rid of him" meaning Spinale (NJA 225). Mr. Fremont admits making this statement. In an affidavit submitted to the District Court, his explanation is:

> "I can say that at no time did I recommend or suggest that any physical actions be taken towards Mr. Spinale." (NJA 227)

This evidence, therefore, suggests that the 1982 Kurt study was not undertaken solely for reasons of revenue augmentation but had an important punitive objective.

Further information as to what occurred at the December 1982 meeting is not provided. Conrail claims privilege because counsel was in attendance. (NJA 347)

However, Conrail undertakes analyses to determine whether its rates should be raised or lowered to cover costs and to maximize profits. These analyses are done both on a systemwide basis, and on a more specific basis by type of traffic, commodity, and individual customer (Conrail, Vol 1, V.S. Elliott at 2).

In late 1982, Conrail conducted an incomplete review of the pricing structure of the perishables commodity traffic in the New York City area. That review tended to show that there are relatively small differences in operations, costs, and other considerations among the several New York City delivery locations to warrant slightly different rate charges among those locations. Kingsbridge, where petitioners' facility is located, has somewhat higher costs (Conrail, Vol 1, V.S. Elliott at 2). Kingsbridge, along with Mt. Kisco, Mt. Vernon and Long Island Railroad interchange points, properly may be priced slightly differently than other New York receiving points because of Conrail's slightly higher delivery costs to these locations (Conrail Vol. 1, V.S. Elliott at 3).

In deciding on its revenue requirement for service to Kingsbridge, Conrail's marketing officers generally but without a detailed cost study took into account the number of claims filed by petitioners which no doubt overall engender higher Conrail costs to process; the somewhat higher costs of operations to Kingsbridge; and anticipated expenses associated with litigation which could be brought by

petitioners to collect on claims (as discussed below) (Conrail, Vol. 1, V.S. D'Orlando at 5-6, V.S. Elliott at 4-6).

Conrail generally concluded that, even in the absence of a completed detailed study, it was losing money on its service to petitioners. Using imperfect calculations of the claims and adding a "profit" margin applicable to New York City perishables traffic overall, Conrail as noted set a surcharge requirement for serving petitioners effective June, 1983 (Conrail, Vol. 1, V.S. Elliott at 6).

Conrail advised the western carriers originating the traffic of its surcharge revenue requirement, and they, as part of their publishing function, incorporated Conrail's surcharge requirement into the overall charges for the through movements they originate (id.). Only Conrail collects the surcharge.

Subsequently, that is after the June 1983 Conrail surcharge, Conrail costing officials completed an imperfect "study" of the costs perceived of serving petitioners. Conrail believes that these perceived costs even without a final study are understated by several hundred dollars (Vol. 1, V.S. Wilke at 12). This information which depends upon subjective judgement and flawed methodology is discussed *infra*.

The Conrail costing officials conclude that even after increasing Conrail's revenue requirement in 1983, Conrail's

charges barely cover its variable costs of service to Mr. Spinale's companies. (*id.*). This flawed conclusion, as noted, is discussed in the pages that follow.

In June, 1989, in view of its own conclusions as to the cost of serving petitioners, Santa Fe increased its revenue requirement for service to petitioners by $500.00 a car (Santa Fe Reply Statement at 2). Subsequently, Santa Fe reduced its potato transportation charges by $300.00 per car for all shippers, but it maintains the $500.00 differential for petitioners (Santa Fe Reply, V.S. Elliott at 10). This charge is far in excess of the claimed Santa Fe processing cost per claim of $268.00.

As to Conrail, the following appears as the Conrail's Kurt, Elliott and Wilke studies. The Kurt report identifies $366.28 in costs "unique" to G. &. T. These costs summarized by category are as follows:

1.	Freight recovery costs for refused loads	$12.69
2.	MDT Protective Service costs	94.18
3.	RPIA Inspection costs	83.00
4.	1980 paid claims for G. &. T., Tray Wrap and Sprout	66.67
5.	Administrative costs for handling claims and law suits	29.72
6.	Outside counsel costs to file law suits	56.15

7.	Outside counsel costs on yet to be filed law suits	23.87

Total Costs (NJA 246 - 247)		366.28

Mr. Kurt was deposed on three separate occasions. His depositions were taken on March 12, 1985 ("March Tr.") May 6, 1985 ("May Tr.") and July 9, 1985 ("July Tr."). Kurt in his depositions reveals that he knows little or nothing about Conrail's three separate cost systems which are referred to as CICA, COSAC or Rail Form A. Mr. Kurt's college degrees are related to horticulture, marketing production and "post-harvest psychology of vegetables" (March Tr. p. 5).

Kurt admits that although he made reference to these three separate cost systems, he can not explain the difference between the three and has no understanding as to the distinction between them. Moreover, he does not know what the cost components or elements were in the CICA, COSAC or Rail Form A Systems (May Tr. 9 to 15).

He bases his additional costs largely upon cost information provided by Conrail in its CICA costs analysis. His testimony indicates he knows nothing about this cost system. He does not know what the term CICA means or how this cost analysis was prepared (March Tr. p. 52). He repeatedly concedes he does not know what cost elements are

included within the Conrail cost analysis (March Tr. p. 57 to 59).

His definition of "unique" G. &. T. costs is all costs incurred by G. &. T. even if these costs are common to other carriers or already are included within the CICA costs (March Tr. p. 59 to 72; May Tr. 19 to 23). In going through the different "unique" costs attributed to G. &. T., Kurt concedes that such costs could be included within Conrail's cost system to some extent but he had no information as to the amount of the costs included within the Conrail system.

Kurt also does not take into consideration the extent to which G. &. T.'s costs exceed the costs involved with all shippers or receivers (NJA 373 -377). Any G. &. T. cost is considered by him to be unique regardless of whether such costs are already contained in any of the Conrail cost systems or common to all receivers. All of the costs identified by Kurt are, therefore, not "unique" to G. &. T. in the sense they are generated only by G. & T (See affidavit and report of Alfred Parziale of J.H. Cohn & Company (NJA 228, A233).

For example, Kurt's report as to MDT Protective Service costs is based upon 6.6 inspections being made per car for G. &. T. at a cost of $14.27 per inspection (NJA 246). Kurt admits however, that MDT performs an average of approximately five inspections per car for all receivers (March Tr. p. 80 to 83). The difference in costs between

G. &. T. and all other receivers (even accepting Mr. Kurt's presentation to be accurate) should be 1.6 inspections times $14.27 or a total of $22.83 and not $94.18 as Kurt states (See also, NJA 234).

Kurt explains that in his study he does not attempt to determine whether G. &. T.'s costs exceed the cost created by other similarly situated receivers (NJA 373 - 375). He explains that he was not directed to do this. His directions were to determine "unique costs" and not identify what portion of costs represent the excess costs of G. &. T. above those created by receivers generally (NJA 374 - 375).

The shortcomings of Kurt's report are further revealed by his inability to explain the cost basis for his statement in the report (N.J.A. 244) that G. &. T. impeded inspections "through threats, intimidation and secretive methods of operation." When questioned, Kurt could only recite second-hand stories about Mr. Spinale without any knowledge of the costs or these alleged incidents (May Tr. p. 77 to 93).

Upon completion of his report, Kurt transmitted it to Jeffrey Elliott of Conrail, who then fixed the amount of the surcharge to be imposed upon G. &. T., Tray Wrap and Mr. Sprout. Elliott did not discuss Kurt's report with Kurt prior to deciding the surcharge be calculated (NJA 371). In fact, Kurt strongly disclaims any responsibility for deciding the amount of the surcharge (NJA 373).

Jeffrey Elliott

Elliott's "calculation" of costs are set forth on a single page of paper which exists in several slightly different versions. (NJA 253, 253A, 253B) The shortcomings of Mr. Elliott's calculations are discussed in detail by petitioner's expert, Mr. Alfred Parziale's report. (NJA 230, 237) Mr. Elliott's explanation is also set forth in his deposition taken on January 25, 1985 ("Elliott Tr.").

Elliott is not satisfied with the amount of the surcharge that flawed Kurt's report seeks to support. He includes additional costs to justify a higher surcharge (See Parziale report, A237). The additional costs included by Elliott do not involve either costs "unique" to G. &. T. or costs that related to G. & T.'s claims activity. For example, he adds a $75.00 end of the year deficit estimate which does not relate to G. &. T.'s filing of claims but concerns a shortfall in revenues because of underpayments by all shippers and receivers (NJA 237; A 286 - 288).

He also includes the cost differential between shipments to Hunts Point and Kingsbridge in the amount of $110.00 as shown in Conrail's CICA report (NJA 254 - 257). This cost again does not relate to G. &. T.'s claims activity but to the fact that Kingsbridge is located in the Bronx less than ten miles further from the Conrail rail yard at Oak Point than is Hunts Point. The mileage obviously differs for all locations outside of Oak Point (NJA 214). The

nearest consignee located in Mt. Vernon is eleven miles from the rail yard, while the nearest consignee in Mt. Kisco is 34 miles away (NJA 214). The same Conrail CICA cost system which estimates a $110.00 differential in cost above the Hunts Point level for Kingsbridge (NJA 254) also indicates a higher cost of $141.00 for Mt. Kisco (NJA 255) and $94.00 for Mt. Vernon (NJA 256, See also NJA 238 114).

Elliott also includes an additional $200.00 "cost" to reflect operating efficiencies at the Hunts Point destination which he believes are not reflected within the Conrail CICA cost system (NJA 293). Elliott admits the amount "had nothing to do with G. &. T." (Elliott Tr. p. 57). Mr. Elliott recalls discussing the proposed cost adjustment in a telephone conversation with someone at the Conrail Oak Point Freight Yard near Hunts Point but was not sure to whom he spoke (NJA 294 - 295). Elliott suggested $200.00 as a "good" number and was told "it sounded like a good number" (NJA 299, See also A 238 914).

With these additions, Mr. Elliott "calculated" approximately $385.00 in "costs" beyond those in Mr. Kurt's report. These costs, however, do not relate to G. &. T.'s claims activity, the reason Conrail now alleges is the basis for the surcharge on G. &. T. These costs also are not unique" to G. &. T. but are common to all non-Hunts Point receivers. A Conrail study intended to recover such costs from all consignees in a

non-discriminatory manner would require Conrail to adjust the rates payable by all consignees located outside of Hunts Point. It has not done this (NJA 259 - NJA 262A).

Prior to May 1983, shipments to consignees at Hunts Point and the Bronx and Westchester (including consignees at Kingsbridge, Mt. Kisco and Mt. Vernon) all paid the Hunts Point rate. (NJA 258) Since May 1983, only the Kingsbridge location has been singled out for the surcharge that is the subject of this petition. (NJA 159 - 262A) A small adjustment above the Hunts Point rate was made for consignees at Mt. Kisco and Mt. Vernon but, it amounted to $40.00 or less at these locations since May 1983. This small $40.00 or less--adjustment above the Hunts Point rate is still in effect. These other locations, however, are not charged the full amount of the operational "costs" which Elliott calculates or anything close to such an amount (NJA 262A). Also, the figures used by Mr. Elliott to produce a much higher surcharge than that stated in the flawed Kurt report are not supported. The "costs" are not costs that Conrail is attempting to recover from other consignees even though such operational costs applicable to Mt. Kisco and Mt. Vernon shipments may be higher than to Kingsbridge.

Moreover, Conrail does not limit the surcharge on petitioners only to Kingsbridge deliveries. It also imposes the surcharge on deliveries to petitioners at Hunts Point and at all other Conrail locations (NJA 216-217). A surcharge that also applies to Hunts Point deliveries cannot be justified

because it allegedly is $300.00 more expensive to make deliveries to Kingsbridge. This argument is untenable.

When Kurt heard about the surcharge fixed by Elliott, he became concerned about the amount (NJA 362). Kurt contacted Elliott's office and also prepared a handwritten memorandum (NJA 223) "regarding the status of G. &. T.'s extra charge of $600.00 per shipment to Kingsbridge vs. Hunts Point" (NJA 363 364; NJA 367). In his memorandum, Kurt points out that the RPIA inspection costs only compared G. &. T. to other New York receivers (NJA 364). Kurt finally points out the flaw in his report; the report overstates G. &. T.'s alleged "unique" costs because his study is not a comparison of costs between G. &. T. and other receivers but a study of G. &. T.'s gross costs which does not take into account the extent to which such costs also are incurred in servicing other receivers (NJA 364).

Kurt's explanatory memorandum was not sent to Elliott because Kurt was ordered by his superior, Bill Chris, not to send it (NJA 362). Conrail, therefore, prevented Kurt from advising Elliott about his concern as to the amount of the surcharge imposed on petitioners.

Conrail also substantially increased the surcharge after 1983 to as much as $794.00 per car (NJA 262B - 263). Petitioners now pay today a even higher surcharge than they were paying in 1983.

Although the 1982 Kurt report was the initial basis for Conrail's surcharge action, Conrail introduces additional documentation to support its contention that it costs Conrail more to service petitioners than other customers. In support of these arguments, Conrail submits additional verified statements by Kurt and Elliott as well as a verified statement of another Conrail employee, William H. Wilke.

The Elliott statement summarizes the action he took in connection with the 1983 surcharge. Mr. Elliott's latest statement does not provide information beyond what is set forth in his deposition and earlier comments. The exhibits to his statement, however, further confirm petitioners' contention that the rate adjustments adopted by Mr. Elliott targets petitioners, and are not cost based. Exhibit 1 of the Elliott statement is a rate sheet for November 1, 1982 which indicates a uniform rate for New York City for rail shipments of potatoes. Exhibit 4, a potato rate sheet for July 1, 1983, indicates that for idaho potatoes the Hunt Point rate us $5200 and the Kingsbridge is $5700. The rate for Mt. Kisco/Mt. Vernon, locations in the New York City, areas more remote from Hunt Point than Kingsbridge, is $5,240. The differential in freight cost between Hunt Point and these locations, therefore, is only $40 notwithstanding Mr. Elliott's conclusion that the cost to service non-Hunts Point receivers is more than $300 greater. It is this erroneous additional cost to non-Hunts Point receivers generally that Elliott uses to justify a surcharge even higher than the flawed Kurt report could document.

Kurt's 1990 statement reviews his 1982 report. Kurt's statement acknowledges that he is "not a costing expert", but is aware that Conrail uses three methodologies for costing its services (Kurt, p. 6). He further indicates that he was asked only to developed "gross costs" not to determine an appropriate rate.

Kurt's 1990 statement makes reference to recent studies that he did in conjunction with Mr. Wilke (Exhibit 5). Conrail's conclusions in this study are different from a 1982 report. There is a difference between the alleged cost of inspections services. The 1982 report indicates erroneously that the cost of providing MDT inspections services to G. &. T. is $94.18 higher than for other receivers. The fact that this figure does not accurately reflect the true cost for G. &. T., is noted in the earlier discussion concerning the 1982 report and in Mr. Parziale's analysis. Exhibit 5 in the 1990 report reflects an additional MDT inspection cost for G. &. T. of only approximately $38. The comparison of RPIA inspection cost between the 1982 report and the Exhibit 5 report is also significant. The 1982 report found a "unique" cost for G. &. T. of $83 for RPIA inspections. However, the Exhibit 5 report indicates that G. &. T. inspection per car is less than $30 while that for all other New York district receivers is approximately $50. Conrail's own studies, therefore, indicate that the total additional inspection cost that can be attributed to G. &. T., based upon its own analysis, amount to far less than the $177 originally alleged. Since inspection costs alone in 1982

constitute nearly 50% of the unique cost found by Kurt, most of the basis for Conrail's contention that operational costs require the imposition of a surcharge does not exist.

Mr. Wilke submits a related report. This report reflects additional studies that Conrail conducted as to the cost of transporting potatoes from various western locations to Hunts Point and Kingsbridge. It is notable that although Conrail has included Newark within this study, it omits the amount for Kisco/Mt. Vernon destinations. Comparison under the various Conrail costing methodologies between Hunts Point and Kingsbridge in 1987 indicates a net deduction from asserted Conrail overall cost for RPIA inspections, claims and administrative costs. These formulas also reflect no expense for legal cost. The MDT inspections are listed as $4.

The areas of additional cost between Kingsbridge and Hunts Point are reduced essentially to the items relating to claims, administrative costs and legal costs. These categories represent, according to Conrail, nearly $600 in costs. The comparison also shows a differential for destination switching and car cost amounting to less than $200. Again, it must be noted, however, that these costs are not peculiar to Kingsbridge. They are greater for locations such as Mt. Kisco and Mt. Vernon yet the rate fixed for these locations is not more than approximately $40 higher than Hunts Point since separate destination charges were first established in 1983. Therefore, to the extent that Conrail seeks to justify

the Kingsbridge surcharge, it cannot rely on operational differences but must rely instead on woefully inadequately supported contention that the costs associated with the mere filing and processing of claims warrant the imposition of the surcharge that petitioners are paying.

C. *Summary of Other Testimony and Evidence*

In addition to evidence concerning the surcharge, petitioners develop evidence in support of their contentions concerning the writing and rewriting of inspection reports by Conrail's inspection agencies, the "RPIA"[1] and the "MDT".

Petitioners submit as part of the record herein a series of deposition statements and affidavits from witnesses who were employed by RPIA and MDT during the extended time relevant to this petition. The statements of these individuals document that the RPIA, continually since at least the early 1970's, engages in a practice of subjectively controlling the inspection reports are prepared by its inspectors. This control over how inspection reports can be written and submitted prevents inspectors from reporting fully how and why

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[1] RPIA was an agency created and owned by rail carriers including Conrail. It remained in existence during much of the time relating to this petition. It since has been superseded by the Transportation Inspection Agency ("TIA"). Throughout this decision reference to RPIA sometimes includes the successor entity TIA.

damages are occurring. This control is designed to protect the railroads from the payment of claims and to give the Railroad Claims Bureau of Conrail a "fighting chance" to dispute claims.

The depositions and other statements by these witnesses are summarized hereafter. Their testimony establishes that as a rule inspectors must write reports which cannot be used to support a claim against a railroad.

Several of these witnesses conducted inspections at petitioners' Kingsbridge Terminal. However, the evidence establishes that the practice of submitting incomplete reports and report rewriting is endemic. Petitioners, because they exercise their right to file claims, are required to pay for the cost of processing claims. As shown, they are asked to pay more than the necessary or reasonable cost of processing claims.

Petitioners obtain statements in support of their contentions from a number of present or former RPIA and MDT inspectors. The testimony of these witnesses shows that the rail inspection agencies encourage their employees to write reports in a fashion which is designed to neutralize or deny causative responsibility for damages. Where employees fail to write reports in a manner favorable to the railroads, the employees are required to change their reports so as to eliminate causative conclusions. A summary of the testimony in this regard follows:

Victor Simas

Victor Simas was an employee of the RPIA and has held that position from the late 1960's. (In the so-called RPIA litigation before a branch of the Supreme Court of New York numerous affidavits, depositions, and statements were taken and herein carries the designation "RPIA") which should be distinguished from the "NVA" litigation. These show that Mr. Simas regularly worked as an RPIA inspector at G. &. T. from the late 1970's.

Victor Simas supports petitioners' allegations. He was assigned by RPIA to inspect shipments at G. &. T. and the Kingsbridge Terminal for much of the period under review in this petition. He carried out these activities at Kingsbridge during most of the 1980's until he went on sick leave. As noted, he provides several depositions and affidavits. Because he was contemporaneously employed by RPIA, Mr. Simas was reluctant to be involved in this dispute. However, Mr. Simas wrote an extensive statement protesting the measures taken by RPIA. He charges that he was instructed to lie at his first deposition in 1983 (RPIA, Vol. 1, page 321. Also see a Simas statement dated October 17, 1985 which is contained at page 98 of Appendix A-98 of the brief of petitions filed in the instant matter on December 21, 1989).

In a deposition on May 2, 1984 in the RPIA litigation, Simas also recites that he was orally advised that

he was fired but, nonetheless, he was kept on as an RPIA inspector. Mr. Simas said that RPIA was engaged in a practice of requiring inspectors to write or rewrite reports with regard to petitioners' shipments (RPIA, Vol. 4, page 764).

In his initial deposition on September 6, 1983, Simas admits changing reports concerning shipments received by petitioner companies (RPIA Tr. vol. 1, Tr. 69 through 75). The activities mentioned in his first deposition also are mentioned in a second deposition taken on May 2, 1984.

Mr. Simas says he was instructed to make changes on reports of shipments to G. &. T., Tray Wrap and Mr. Sprout. His statements indicate that this occurred in connection with hundreds of reports. He indicates that the meaning and content of his reports after corrections show different implications than originally stated (A77 et seq.). His affidavits mention specific occasions when RPIA superiors, after the inspections took place, required him to make changes in reports. In an affidavit dated August 20, 1984, Mr. Simas states:

> "The purpose of these changes were to place the blame on the shipper rather than the railroad." (A95)

Mr. Simas identifies his superior as Don Goss.

Simas also testifies that he would issue a Form 20 or "Bad Order" report if he concluded the railroad was at fault. Notwithstanding the issuance of "Bad Order" forms, Conrail sometimes has refused to pay claims based on these reports (A79).

RPIA also has recommended the denial of payment on claims where its own inspectors have issued Form 20 or "Bad Order" slips. Inspectors testify that they do not issue a "Bad Order" slip unless the carrier is responsible for the damage to the number of cartons or containers set forth on this report. The affidavit of Linda Strumpf, Esq., petitioner's claims representative, sets forth some examples where Conrail refused to pay claims even though Bad Order slips were issued (A72 to 76).

Because of Mr. Simas' physical condition, he was not deposed in connection with the ICC proceeding. His prior deposition statements and affidavits are available. He was prevented from writing causative reports and required to rewrite, after the fact, reports involving G. &. T., Mr. Sprout and Tray Wrap.

The experiences that Mr. Simas describes are similar to those that have been described by a number of former RPIA inspectors. The statements of these inspectors follow.

Robert J. Driscoll

Mr. Driscoll was deposed in connection with the RPIA litigation in New York and gave a supplementary video tape deposition in connection with this proceeding. Mr. Driscoll was employed by the RPIA from November 1970 through 1972. He left to take employment with the U.S.D.A. as an inspector. He was at the U.S.D.A. from the time he left the RPIA until July 1981. Mr. Driscoll, as an inspector at the RPIA and the U.S.D.A., inspected shipments received by Petitioners at Kingsbridge. Mr. Driscoll testifies that while he was working at the RPIA he was constantly under pressure to rewrite reports, especially those where the blame for damages could be placed on the railroad. The blame for the damage could be shifted from the railroad by either adding to the report when it was rewritten or taking something out. (October 10, 89 Dep., P. 19) Mr. Driscoll also explains "Bad Order" reports or Form 20 Bad Order reports. As he explains, a Bad Order report identified cartons of produce that had been damaged (89 Dep, P. 20). Mr. Driscoll testifies that he was required to rewrite reports and to change certain phrases that were not acceptable to the RPIA. He states:

> "By substituting certain phrases, it would tend to shift the blame from the railroad to the shipper to alleviate a possible claim." (P. 24)

The rewritten report would not accurately reflect what, in his judgment, had happened in terms of the damage that occurred. As he stated, "it would change it just enough

to make it different than what I had written originally." (P. 25) Mr. Driscoll testifies that when he was with the U.S.D.A. he was free to write his report honestly to reflect what he believed to be the cause of the damage. By contrast, the RPIA instructions prevented him from reporting his opinion as to what caused a damage condition (Ps. 28 and 29).

Driscoll was instructed by his supervisors to rewrite reports in such a fashion because "it was necessary to write them this way because the railroad would be subject to a claim, and by phrasing it that way, we tended to shift the blame from the railroad to the shipper" (P. 29).

Driscoll gives as an example an inspection of onions which had been frozen. His initial report reflected a freezing condition. The cars were unheated and did not have auxiliary heaters in them. The inspection took place over several days. On the second day he was accompanied by his supervisor, Mr. Van Kuren, now employed by Conrail. During the evening, the railroad had added heat to the cars and took the freezing out through the use of auxiliary heaters. As a result, when inspected on the second day, the onions, instead of having a frozen condition, showed watery scale. (P. 35) Mr. Driscoll was directed by Mr. Van Kuren to rewrite these to reflect damage by watery scale which is a field disease and the liability for the damage would then be removed from the railroad and put on the shipper (P. 36). If Driscoll had reported a freezing condition, the railroad would have been

responsible for the damage. By reporting watery scale, the damage would be construed as shipper liability and not railroad liability (P. 37).

Mr. Driscoll took a pay cut, left the RPIA and went to work for the U.S.D.A because he objected to rewriting reports (P. 37). He explains that he did not like changing reports but the pressure was you "did it or you look for another job." (P. 40) Mr. Driscoll reports that conditions at the U.S.D.A. are different. The government regulations are more thorough and he writes what "we saw" (P. 40).

Driscoll explains other ways in which he was required to write or rewrite RPIA reports. In some reports, it was noted that damage had occurred and bracing was not in place. The fact that the bracing was not in place did not cause the damage but the reference to the bracing was a method of writing a report with an omission because "we didn't describe the bracing" (P. 47). Mr. Driscoll indicates that the inspectors are capable of determining whether the shipper had braced the load originally in accordance with railroad requirements. If the bracing had given way, however, they could only write "inadequate bracing" without explaining why. If the bracing was properly installed, the blame could be on the railroad (P's. 47 through 49).

Driscoll also explains how RPIA reports were written or rewritten to protect the railroad through the use of

descriptive phrases such as "overhead weight." (P's. 52 to 55)

Daniel R. Arcery

Daniel R. Arcery is now employed as an inspector for the U.S. Department of Agriculture ("U.S.D.A.") and has worked for that agency since 1979. Prior thereto, he was employed as an inspector by the RPIA from 1975 until he joined the U.S.D.A.

Arcery was deposed in the New York RPIA litigation on May 14, 1985. (1985 Tr.) In addition, a video tape deposition of Mr. Arcery was taken in this proceeding on October 10, 1989. (1989 Tr.)

Mr. Arcery's testimony corroborates petitioner's restrictions concerning the manner in which the RPIA reports are prepared concerning damage and the responsibility of the railroad for such damage.

Arcery in his depositions explains in detail how the restrictions placed on him by the RPIA in writing reports and reporting damages could overlook the cause of damage. The report have to be written in such a fashion so that the railroad is not blamed. He gives as an example, a shifting of a load of flour to create a "void" or open area which, in his opinion, is caused by car humping; a movement of the load

that could occur when one freight car rolled into another (1985 Tr., p. 24).

RPIA prohibits inspectors from writing their reports to explain why a load shifted to create a "void." The movement of the load, however, makes it impossible for the consignee to remove the flour bags in the ordinary manner by fork lifts. RPIA requires the inspectors to tell the consignees they had to mitigate losses. The consignees might be told to remove the load by hand although the inspectors know this cannot be done because it is not economical to unload in this manner. If a consignee removes bags by fork lift, further damage to the bags can occur because of puncturing or spearing of the bags. RPIA reports may set forth fork lift damage in a manner failing to disclose why the damage to the load had occurred. Such may provide denial of the liability (1985 Tr., p. 22 to 26).

During his video tape deposition, on cross examination by Conrail, Mr. Arcery reviews an incident concerning the shifting of the flour load (1989 Tr., p. 42 to 48). He uses this incident to help explain how the RPIA prohibition about using the term "shift" and the RPIA requirement about reporting the existence of a "void" creates a problem and may be used by the railroad as a basis for denying claims (1989 Tr., p. 46-47).

Arcery testifies that he considers the reports he wrote for the RPIA to be biased in favor of the railroad (1985 Tr.,

p. 37-38). He further corroborates that he rewrote reports that would lead to the conclusion that there is a railroad liability. Inspectors omit words and rewrite it (1985 Tr., p. 38). Arcery believes he was expected to write his reports in whatever manner he could to protect the railroad (1985 Tr., p. 39).

Arcery believes that techniques were used by RPIA to "educate" inspectors to write their reports to protect the railroad, and "that there was a special way to write reports, and it was a biased way" (1985 Tr., p 40).

Once he understood what was expected, however, he wrote reports the way the RPIA expected. (1985 Tr., p 39 to 43) Shortly after being employed by RPIA, he realized that the RPIA expected the inspectors to write reports that "would take the blame away from the railroad and pass it on to the consignees" (1989 Tr., p. 10).

Arcery gives other examples of how reports would be written to protect the railroad from being responsible. In one case, he saw mud, dirt and fresh grass on the side of the car. While he was certain it was the railroad's fault for the damage to the flour in that car, he was not able to report the fact of a derailment (1989 Tr., p. 12 to 15; 1985 Tr., p. 73 to 76; p. 12 to 15).

He became uncomfortable with the way he was to write reports (1989 Tr., p. 10 to 12). He felt that his reports

were not honest and he finally reached a point where he left the RPIA to take a job with the U.S.D.A. at a reduction of $3,000 in salary (1989 Tr., p. 20). Even when matters were discussed with union officials, RPIA inspectors were told that their jobs "were being watched and not to 'rock the boat'." Under these circumstances, people left if they did not like what was going on and felt it was not honest (1989 Tr., p. 51).

John Orlando

John Orlando was employed as an inspector by the RPIA from 1974 to 1978 and was assigned to make inspections at petitioner's place of business at Kingsbridge. He was thereafter employed as an inspector by the U.S.D.A. for an additional two years. Mr. Orlando was deposed in connection with the RPIA litigation in New York on January 22, 1985 and gave a video tape deposition in this proceeding on October 18, 1989.

Mr. Orlando's testimony reinforces what was said by Simas, Driscoll and Arcery. Mr. Orlando was subject to the same instructions to write or rewrite reports to protect the railroad. In explaining the reasons for leaving the RPIA, he testified in part:

> "Well, it stemmed from the fact we were supposed to be guarding our job. Everyone was afraid for their job and it became a lot of

> pressure on how the reports were written, to be written in such a manner as to give the railroad as much protection as we could think of. And, it became a situation that was intolerable to me. I didn't want to do it any longer." (1989 Tr., p 10 and 11)

In response to the question as to whether he could write accurately and honestly his reports for the RPIA, Mr. Orlando testifies:

> "We were told how to word the inspections. These words were not chosen at random. They were--we were told how we could--what words we could use in the inspection to describe this situation or what words we could not. We were told that certain words imply different damages. One word might imply damage in transit, another word might imply it might have been loaded that way, and we were told to use the wording that would give the railroad a chance to fight in court. If we used a certain word there would be no fight in court. We would lose. (1989 Tr. 12)

He then goes on to testify:

> "My job with the RPIA was to inspect the loads, give them a description of what I saw,

> and give them a reason not to pay a claim. I had to find--find a reason within that load why it wasn't necessarily railroad damage. Give them a back door." (1989 Tr. p 14)

When questioned whether he was able to report accurately what he observed when he followed RPIA instructions, he replies:

> "We could not be objective. We worked for the railroad. My paycheck was from the Eastern Railroad Association. I would--I would never--we were never told not to count the correct number of damaged packages but the wording would be the way the railroad wanted them worded. We were told how to word a situation and how not to word it. If you worded it incorrectly you would be told to rewrite the inspection using the correct wording." (1989 Tr. p 15)

Mr. Orlando states that in following these instructions he was told that this was what the railroad wanted (1989 Tr. p. 15).

The limitations on how RPIA would permit him to write reports prevented him from reporting instances where damage had occurred because of what he believed to be carrier fault. He testifies:

> "Yes. We were told never to write the word "carrier handling." I never handed in an inspection--there is none filed to my knowledge that say "carrier handling." No matter what the problem could have been. It could have been derailment, it could have been delayed a month. It doesn't matter. Carrier handling--if we had no other way out we'd say it was--there was a box that you could check that said internal "other." And a list of different sources of damages and the final thing would be "other." There was a box for "carrier." We were told never to check it." (1989 Tr. p 16)

In response to the question as to whether he ever saw damage caused which in his opinion as an inspector was the fault of the railroad, he testifies:

> "Yes. As I had mentioned, if I would see a load that was derailed and there are braces, walls that move in the middle of the car to protect it from moving it, to avoid in the center, that wall was completely sheared off, I knew the load was derailed. I might even see debris hanging on the side of a railroad car. I still couldn't say it was carrier handling." (1989 Tr. p 17)

Mr. Orlando contrasts the manner in which the RPIA asks reports be written with the way that he wrote up inspections for the U.S.D.A. When asked if he had similar constraints at the U.S.D.A., Mr. Orlando replied:

> "No. We were able to say whatever we wanted, but we weren't very interested in the lading or how it was loaded. It was a brief comment. You might say the load was shifted which we couldn't say before from the front of the car to the back of the car three feet. And it would be very brief, where with the railroad it was an extensive description. Half of our inspection was how it was loaded.

Mr. Orlando details how the RPIA, generally through Don Goss, his supervisor, would require the rewriting of reports to "give the railroad a better chance to fight claims" (1989 Tr., p. 21 through 23). The RPIA required them to rewrite a new report and return it with the original report which had been marked up by Mr. Goss (1989 Tr., p. 22). He also explains how Mr. Goss would insist that he rewrite the report to insert phrases such as "due to overhead weight," in instances where Orlando would have left it out because he did not know that was the cause of the damage (1989 Tr., p. 28).

Conrail's examination of Mr. Orlando sought to suggest that the changes wanted by Mr. Goss were simply a

matter of semantics. When asked if the changes that Goss was requesting was merely a matter of semantics, Mr. Orlando testifies:

> "Changing these words around would take the railroad off the hook." (1989 Tr., p. 49)

Moreover, Mr. Orlando indicates that he understood that this was the purpose in rewriting the report as instructed by Mr. Goss (1989 Tr., p. 50).

In his 1985 deposition, Mr. Orlando details the instructions given by Don Goss (1985 Tr., p. 11 to 22). Mr. Orlando's testimony indicates that he had to rewrite reports and that his original reports were destroyed (1985 Tr., p 13). The changing of the reports "would bias the inspection towards the railroad to protect them" (1985 Tr., p. 15). As written, the reports would not reflect "the railroad's liability, no matter what had happened to that railroad car in transit" (1985 Tr., p. 16).

Mr. Orlando was specifically directed to rewrite reports where he had indicated that the cause of damage was carrier handling. He states that although there was a box indicating carrier handling they were instructed never to put the blame on the railroad. If they could not come up with any other reason they were to check the box labeled "other" (1985 Tr., p. 16). Even in circumstances where there had been derailments and the door had been torn off the car, he

was directed to change the notation from "carrier handling" to "other" to "give the railroad some kind of chance to fight it" (1985 Tr., p. 17). In another case, the railroad had pushed a car through a brick wall and he had noted carrier handling and Don Goss told him to change it to the load dividers not being locked properly. In that report, "the official cause of damage were load dividers, not going through a wall" (1985 Tr., p 17-18).

Mr. Orlando indicates that his job "was to write inspections to protect the railroad from any kind of claims in any way I could think of" (1985 Tr., p. 19). He says that he was told this by his supervisors Don Goss and Joe Rovelli (1985 Tr., p. 19 and 20).

When asked if he had ever complained to a union supervisor, who was also his supervisor at RPIA, he also states that the whole situation was basically a company "joke," which he says was the rewriting of inspection reports to conform to Don Goss' way of looking at things (1985 Tr., p. 20 and 21).

Mr. Orlando states that he did not like the atmosphere at the RPIA so he "left and I went to the government where I was secure and I didn't have to be bothered with this kind of stuff anymore" (1985 Tr., p. 22). He says he had to save the railroad enough money to warrant wages through the form of reduced claims. He says he had to give the claims people something to work with. "That's

what we were always told, give them something to work with, something to fight with" (1985 Tr., p. 22).

Mr. Orlando also provides an affidavit dated July 10, 1984 which essentially summarizes the statements that he sets forth during his two depositions. In his affidavit, which is attached to a video tape deposition, he asserts that Don Goss at RPIA required reports to be rewritten. He also establishes that certain terms such as "shift" can not be used in his reports.

Ralph Rubbo

Ralph Rubbo was a long-term employee of RPIA. He was employed in 1944 as a cooper repairing damaged containers. He continued in that position until 1978. He worked for RPIA in the Hunts Point area and at the Kingsbridge Terminal. After 1978 he worked for the RPIA as an inspector and then was transferred and worked as a Conrail inspector in the Massachusetts area until he retired in 1983.

Mr. Rubbo's deposition was taken in connection with the New York RPIA litigation on April 9, 1875 (1985 Tr.). He also provides a video tape deposition taken in this proceeding on October 10, 1989.

Mr. Rubbo's testimony is consistent with and supports the testimony of Messrs. Driscoll, Arcery, Orlando

and Simas concerning RPIA's requirement that inspectors' reports are rewritten where there is an indication of railroad liability (1985 Tr., p. 24 to 26).

Mr. Rubbo also issued "Bad Order" or Form 20 reports and testifies that these reports were issued by him only where he concluded the railroad was at fault. The reports set forth the extent to which shipments have been damaged. It is his understanding that shippers and receivers are entitled to be compensated for the damage set forth on the RPIA form (1985 Tr., p. 35 to 37; 1989 Tr., p. 10 to 12).

For the last several years of his service at Hunts Point, he was not permitted to write Form 20 reports unless he did so with an inspector. He testifies that in many instances when he felt it was a Bad Order situation or railroad liability, the inspectors in their reports would attribute the damage to overhead weight which is a shipper liability. In those instances where he and an inspector were in disagreement about issues such as overhead weight, he was told by the inspector that "overhead weight is what we got to put down" to take claim responsibility off the railroad (1989 Tr., p. 22 to 25).

During the last part of his employment with RPIA in New York, he was stationed at G. &. T. eight hours a day to act like a "cop or spy." His job was to report whether anything was being done that wasn't supposed to be done as

to willful damage or breaking of the packages. He objected to this assignment but during his period there as a spy he never saw any damage done by the consignees (1989 Tr., p. 40 to 42).

When Rubbo was reassigned to Massachusetts, he worked for a short period as an RPIA inspector and then was transferred directly to Conrail's payroll as an inspector. As a Conrail inspector, he received credit for his entire service with the RPIA and had the same seniority status that he would have had if he had been with Conrail the entire period (1989 Tr., p. 31 to 37). His pension is based upon the entire span of service he had both for the RPIA and Conrail and is paid by the Railroad Retirement Board (1989 Tr., p. 65 to 67).

Louis Maniaci

Mr. Maniaci was employed as an inspector by the RPIA from 1974 to 1977. He left his position with the RPIA in 1977 and became an inspector with the U.S.D.A. He is now night supervisor with the U.S.D.A. His assignment during his entire period of employment was at Hunts Point and he frequently inspected shipments at the Kingsbridge Terminal both for the RPIA and U.S.D.A.

Mr. Maniaci's testimony also is consistent with and supports the statements made by Messrs. Driscoll, Arcery, Orlando, Rubbo and Simas. He was not permitted by RPIA

to write what he actually saw in terms of the condition of a freight car shipment. The information he could not report was information that would tend to indicate carrier responsibility (1989 Tr., p. 22). He also was required to rewrite reports and the effect of such rewritten reports was to reduce carrier responsibility (89 Tr. p. 36).

In response to the question as to whether he got an explanation as to why the reports should be written in such a manner, he replies:

> "Our job there was to cut down on claims, and that we would try to avoid putting the blame on the railroads." (1989 Tr., p. 23)

Mr. Maniaci testifies that he left the RPIA and went to the U.S.D.A. He left to get better job security but he also left the RPIA because he was instructed to change or rewrite his reports (1989 Tr., p. 14 and 15). His experiences at the RPIA are also set forth in his affidavit of July 24, 1984 (RPIA Record on appeal. Vol 3, p. 761) and his affidavit dated March 4, 1987 which concerns the issuance of "Bad Order" slips. His 1987 affidavit indicates that an RPIA inspector would not classify packages as "Bad Orders" if the effect was to make the carrier responsible for the damage (RPIA, Record on Appeal Vol 3, p. 1001).

MDT--Statements of John and Kevin McGuire

In addition to the testimony concerning improper practices in report preparation at RPIA, petitioners submit the affidavits of John R. McGuire and Kevin J. McGuire, former employees at MDT (A102; 105). The McGuire affidavits are to the effect that MDT reports generally and with specific regard to G. &. T. are fabricated or falsified. This testimony is disputed by verified statements from MDT officials which are submitted by Conrail. The statements submitted on behalf of petitioners apart from the McGuire affidavits are supported by the evidence submitted by Ms. Strumpf in her affidavit of December 13, 1989 concerning inaccurate RPIA and MDT reports (A108 et seq.). The Strumpf examples are discussed in greater detail hereafter. This evidence is not offset by the denials provided by Conrail. However, as hereinafter stated, the McGuires' testimony is not used as a basis for this decision.

Herman Grappel

Herman Grappel served as general manager of George Tiefer, Inc. ("Tiefer") for more than 30 years. He testified at the hearing on Plaintiff's motion for a preliminary injunction before Judge Ackerman, U.S. District Court Judge, on June 11, 1984 (Referenced herein as 1984 Tr.). He was deposed by Conrail, without the plaintiffs being present in the New Jersey proceeding on May 29, 1985

(1985 Tr.). Mr. Grappel also provides video tape testimony in the instant proceeding (October 26, 1989 I.C.C. Tr.).

In his testimony before Judge Ackerman, Mr. Grappel indicated that Tiefer was the sole suppliers for Waldbaum's. This is a supermarket chain similar to Pathmark and Shop Rite in the New York area. In 1984, Grappel had been doing business with G. &. T. for about 20 years. He testified that up to the beginning of 1984 G. &. T. had been the regular "fill-in" supplier for Tiefer.

Tiefer bought for the Waldbaum chain approximately $200 million a year in produce. Most of this produce was bought directly. It filled in locally and G. &. T. was Tiefer's main supplier as a local packer. (1984 Tr. 52 through 54)

Grappel testified that in 1984 he noticed that G. &. T.'s prices were higher than competitors. As a result, Tiefer substantially reduced G. &. T. for fill-ins. In response to questioning from the Court in the New Jersey litigation, Grappel testifies as follows:

> THE COURT: Did you ask him why? (His price was higher)
>
> THE WITNESS: He said--

THE COURT: Just answer my question. Listen to my question. Did you ask him why his potatoes were higher?

THE WITNESS: Yes. And he said that's the price I got to get. He says. Hymie, my rate is a lot more than the other guys around here, and my overhead with the new rate is driving me batty. Now, once in a while if I need 50 or a hundred bags. I'll take the hundred bags. When it comes to 900 block or 600 block. I can't overpay that much.

THE COURT: What percentage of your 5%, prior to the beginning of the year, where you buying from G. &. T.?

THE WITNESS: I bought all fill-ins from G. &. T.

THE COURT: In other words, 100% of your local buying was done through G. &. T.?

THE WITNESS: On my shortages on prepacked potatoes, yes, yes.

THE COURT: And now what percentage?

THE WITNESS: Very little. I would--minimal.

THE COURT: Minimum?

THE WITNESS: Yes.

THE COURT: Because of the differential in price?

THE WITNESS: We'll, it's ten cents per five-pound bag. It's a big difference. (June 11, 1984 Hearing before Judge Ackerman, p. 56)

In the 1985 Conrail deposition, Grappel confirms his earlier testimony. He characterizes the purchases of western potatoes from G. &. T. as minimum and very little (1985 Tr. 33). He also states that Spinale and G. &. T. had been more price competitive until about two years ago. He gives examples of G. &. T.'s inability to meet price competition (1985 Tr. page 18). He further states in response to a question as to whether G. &. T. could not compete with the price being offered by one of his competitors:

"Tony was cheaper. The answer to that is Tony was cheaper two or three years ago; he is not cheap now." (1985 Tr. 19)

Grappel also testifies that purchases of western potatoes is by railcar. He states that it is "too costly on trucks" (1985 Tr. page 8).

In his 1989 video tape deposition, Mr. Grappel testifies at length with regard to the shipment of potatoes from idaho and other western states. In response to the question in which Conrail suggested that there were ways other than direct rail freight to ship idaho potatoes to the New York area, Mr. Grappel says, "rail is always cheaper" (1989 Tr. 40; 39-42). He further states that there is no combination of rail and truck which would be cheaper than rail car delivery. He answers:

> "You can't. That is the cheapest mode of transportation is your rail." (1989 Tr. page 70; See also Tr. 13-15)

Mr. Grappel further testifies with regard to the effect of the surcharge as follows:

> "Q. Prior to Tony having a surcharge placed on him, was he able to satisfy your fill-in requirements locally most of the time?
>
> A. By all means.

Q. Was his price as good a price as you could get from anyone?

A. As competitive as could be, yes.

Q. Has that remained true since--

A. No.

Q. --the freight charge?

A. Not at all.

Q. Is that part of the reason why you have been looking for alternative sources outside of the local area?

A. Yes. Well, I have to be competitive and--we have somebody looking over our shoulder. You just can't go out and buy flagrantly, give this guy a nickel more or three cents more. Might sound like a nickel and three cents, but when you have five in a bag, that is 15, 20 cents a bag. Then if you buy four, five hundred, it amounts to dollars. Many dollars. (1989 Tr. 67-68)

Mr. Grappel's testimony also confirms that idaho potatoes are distinctive and command a premium price (1989 Tr. Page 52 to Page 56).

Mr. Grappel's testimony indicates that his company has altered its claims filing since the surcharge was imposed on G. &. T. He stated that "we could prove them" but "we are afraid that we're going to have somebody come back at us and take it back another way" (1989 Tr. page 29). He believes that "they (the railroads) do what they want--I feel that way. We don't get the service we used to get from the railroad. Terrible service" (1989 Tr. page 30).

Grappel also states that RPIA reports differ from the reports from the U.S.D.A. He testifies:

> "Well, there was an occasion that we had to send away to get the report according to what we had and to make our claim. And it was entirely different from what it originally was. The temperatures were different, the product written up different." (1989 Tr. page 72)

When he attempted to get an explanation from the inspector, Grappel states that the inspector said "he was told to turn it in that way." And "what do you want from me? I only do my job" (1989 Tr. page 73 to 74).

D. *Conrail Defense and Petitioners Response*

The statements from Mr. Doyle of MDT, Mr. Oliver of RPIA (now TIA) and Mr. Goss of RPIA (all in Conrail Reply, Vol. 3) describe the purpose of their agencies. These statements provide the basis for Conrail's contention that its inspection agencies have enforced "a company-wide policy which restricts inspectors to recording accurately the condition and temperatures of a given load, without speculating on the cause of any noted damage" (Conrail, Vol. 3, p. 4).

Conrail argues that the actions of the inspection agencies should not be ascribed to the rail carrier itself. In its response, Conrail provides documentation that supports petitioners' contention that these agencies are controlled by the carriers. Conrail submits a verified statement of Boyd M. Oliver, who was employed by RPIA and the Eastern Railroad Association ("ERA") from 1958 until 1987. Since 1987 he has served as President of the Transportation Inspection Agency Inc. ("TIA"), which succeeded to the inspection responsibilities of RPIA. These agencies were formed by the railroad companies, including Conrail and its predecessors. Mr. Oliver in his verified statement concedes that RPIA was an agent of the railroads, which fact he says is "clearly disclosed" (Conrail, Vol. 3, p. 6). He purports to dispute petitioners with regard to the ownership of RPIA by the railroads. He admits, however, that the ERA, which included the RPIA, was formed by the eastern railroad

companies and that each of the railroad companies operating the association designated a director to formulate and implement policy of the ERA (p. 2). Notwithstanding, Mr. Oliver without further explanation or statement concludes "the member lines had no ownership interest in RPIA nor do they now in TIA." Since the association is a non-profit association, Mr. Oliver must mean that there is no ownership in the sense of an equity interest. To the extent that he association is dominated and controlled, however, that domination and control, whether called equity ownership or anything else, rests in the hands of the rail carriers including Conrail. There are no other "owners". The intimate relationship between Conrail and RPIA is confirmed by the employment experience of RPIA employees such as Mr. Rubbo, who transferred from RPIA to Conrail with all his employment and retirement rights (Rubbo Tr. 35-37; 64-65). MDT is owned by Conrail.

Petitioners, however, do not rely upon the testimony of former employees with regard to the practices of MDT. Petitioners also submit MDT and RPIA reports which are contradicted by evidence such as temperature tapes and reports prepared contemporaneously by the USDA. This evidence is at substantial variance with the conclusions concerning damage set forth by the RPIA and MDT. This documentation is discussed at considerable length in the affidavit submitted by Linda Strumpf dated December 13, 1989 (A108-115) and a supplemental affidavit of March 2, 1990. Ms. Strumpf has served as counsel to the Petitioners

since 1977 and is knowledgeable about the claims submitted by Petitioners and the disputes between Petitioners and Conrail and its inspection agencies. In her December 1989 affidavit, Ms. Strumpf reviews in detail four examples concerning MDT reports which are inconsistent with objective evidence as well as USDA reports. The first example involved a shipment of potatoes to G. &. T. in May 1988. Petitioners submit a temperature recorder tape which shows that the temperature in the rail car during shipment rose to 70 degrees and then 80 degrees. These are temperatures above the level necessary to prevent decay. An USDA report that was conducted with regard to this shipment reveals substantial decay. The RPIA report by contrast recites a 42 degrees temperature with "no decay". The inconsistency between the RPIA report and the evidence from objective USDA sources supports petitioners' contention that the RPIA inspection reports did not accurately reflect the condition of this shipment. In response, Conrail submits a verified statement from Mr. Donald Goss. As to this first example, he offers no substantive explanation for the differences between the RPIA report and petitioners' evidence. He says that RPIA took temperatures at certain locations within the car. He does not attempt, to explain why the temperatures reported by the RPIA would be as low as 42 degrees or why no decay was noted in the face of petitioners' evidence.

The second example concerns a shipment of potatoes in May 1988. The temperature tape and USDA report, dated

May 11, 1988, indicate that these potatoes were damaged as a result of freezing. The May 11, 1988 report recites temperatures in the range of 29 degrees to 36 degrees F.

The MDT report purports to show temperatures throughout the shipment period ranging from 39 degrees - 42 degrees. Such a report cannot be accurate in view of the temperature tape. The MDT report is further contradicted by the USDA report which shows pulp temperatures far below the low range reported by the MDT, a condition that could not have been caused by local temperature conditions at the G. &. T. terminal in May. Moreover, Conrail has not submitted any evidence that local temperatures were so low that freezing occurred as a result of local temperature conditions after the car had been received and unloaded.

Mr. Goss' explanation again is a recital of the statements from the RPIA report, which fails to reflect a frozen condition with regard to these potatoes. He attempts to blame the inaccuracy of the RPIA report on petitioners "continuing obstructions". The RPIA report, however, does not reflect in any manner that the report was incomplete or inadequate because the inspector could not perform his duties. The report recites transit pulp temperature ranges on May 9, 1988 between the range of 40 degrees to 42 degrees. Considering the objective evidence of the tape and the USDA report, the temperature ranges reported by RPIA could not be characteristic of this load. The RPIA report also does not reveal the damage that existed with regard to frozen

potatoes. Any decision based solely upon the MDT and RPIA reports would have absolved the rail carrier for responsibility for the damage which resulted from the freezing conditions during shipment.

The third example in Ms. Strumpf's affidavit appears at A 112 through A 113. Again, petitioners provided a temperature tape which confirms that the temperature during most of the shipment was 32 degrees. The USDA inspection on June 3, 1988 confirms that 400 sacks of potatoes were frozen. Nevertheless, the RPIA inspection which was made one day earlier on June 2 reveals no frozen potatoes. Mr. Goss' explanation obviously is an attempt to talk around this evidence neither admitting or denying the inaccuracy of the RPIA report. The Goss response is to blame the discrepancy on G. &. T. rather than to address the failure of the RPIA report to reveal a freezing condition. (Presumably, Goss believes that on June 2, G. & T, froze the potatoes.) Indeed, the report prominently displays a series of pulp temperatures during transit taken days after receipt of the load reflecting temperatures ranging from 40 degrees to 52 degrees. A recital of such temperatures suggests an effort to provide a defense to possible claims for freezing damage rather than an effort to reflect accurately the condition of this load (Vol. 3, Goss p. 10-11).

The fourth example set forth in Ms. Strumpf's affidavit (A113-A115) consists of a TIA inspection report reflecting examinations on October 11, 1989 through

October 16, 1989. During four inspections, the TIA report reflects proper temperature ranges and nothing wrong with the car load of potatoes. This report is contradicted by a USDA report on October 16, 1989 made 20 minutes prior to a TIA inspection on that same date. The USDA report records pulp temperatures from 28 degrees to 42 degrees--13 degrees to 14 degrees colder than the temperatures recorded by the TIA at almost the same time. The USDA report shows 1,034 cartons in the car all showing freezing conditions. The TIA report shows no freezing whatsoever. The temperature tape recorder corroborates the USDA report by showing that temperatures during shipment were below freezing. With regard to this shipment, Mr. Spinale also provided pictures of the walls of the car which showed ice on the walls 4-5" deep (A43-44; 71 a & b). Nevertheless, the TIA inspection report fails to note the existence of ice on the walls.

Mr. Goss' response again seeks to explain the discrepancies based upon RPIA's inability to inspect the load. He also states that since he is not privy to what Mr. Spinale has given the USDA for inspections "that he pays for and orders" it is difficult to explain precisely the variance (Vol. 3, Goss 11-13). The Goss explanation is unpersuasive. Conrail itself obviously is not comfortable with the TIA--MDT reports produced by petitioners. At the same time that it seeks to dispute these reports through its verified statements, it argues alternatively that Conrail does not base its evaluation of damaged claims solely on the RPIA and

MDT reports. It contends, for example, that in the second case referred to herein that Conrail actually paid a portion of the damaged claim which was submitted "despite the absence of freezing reported in the RPIA and MDT reports" (Vol. 3, p. 28). In view of the dispute before this commission, Conrail's decision to make such a payment may have been a wise business decision. The payment of the claim, however, is not an answer to the charge that these inspection agencies have followed for a number of years a policy and pattern of producing erroneous, incomplete or neutered reports. Such a policy can only inordinately increase the claims, processing expenses of Conrail without even considering the amount of the claim itself.

Moreover, Conrail's charges that petitioners abuse their claims rights is based upon the reports prepared by these inspection agencies. If RPIA and MDT had not produced misleading and inaccurate reports, Conrail might well be able to argue that petitioners filed spurious and excessive claims. Conrail also could use such reports to justify the railroad's surcharge.

Petitioners filed a supplemental brief and appendix further disputing Conrail's response. In addition to Mr. Spinale's affidavit (Exhibit J), Exhibit I of the Supplemental Appendix sets forth an additional affidavit of Ms. Strumpf with regard to the Conrail arguments. It is clear from Ms. Strumpf's affidavit that Conrail's arguments that seek to downplay the four examples presented are not well founded.

For example, Conrail challenges the authenticity of petitioners' claim with regard to the tape in example 1 because allegedly the original was unavailable (Vol. 3, p. 26). Ms. Strumpf's affidavit explains that Conrail was advised that the original of this tape had been given to the shipper since this was a shipper's claim (Exhibit I, p. 3). Conrail's statement that the original of the tape was unavailable does not fully or accurately provide the facts concerning this tape. The argument that the tape should not be considered is unwarranted. The Strumpf affidavit also disputes Conrail's contentions that Mr. Spinale would not permit RPIA to carry out inspections (Exhibit I, p. 1). What is even more dispositive of this contention by Conrail is the RPIA reports themselves. These reports in no way reflect the inspection agencies inability to conduct a complete or adequate inspection because of interference by the receiver. The reports purport to provide an inspection basis upon which the rail carrier and others could make decisions with regard to possible claims. Having gone through the process of preparing reports which presumably were intended to serve such a purpose, efforts after the fact to discredit these reports or limit their application because of alleged interference is not persuasive.

Petitioners allegations include the contention that Conrail has imposed the surcharge here under review for punitive reasons and to discourage shippers and receivers generally from the filing of claims.

Petitioners submit in support of their contentions Conrail's discovery responses. In Conrail's supplemental response to petitioners' first set of interrogatories, filed November 6, 1989, the rail carrier provides information at pages 162-177 of the Appendix To The Brief Of Petitioners dated December 21, 1989 A162 to A177. This information sets forth claims history, shipper by shipper, which reflects a significant change in claims filing by Hunts Point receivers. For the years 1980 through 1984, these receivers filed a total of 827 claims in the amount of $3,148,965.40(A177). During the period from 1985 through April 13, 1989, the number of claims filed dropped to 152 and the amount of claims was reduced to $828,923.60(A177). Conrail has not submitted any persuasive explanation for such a dramatic reduction in claims. Even assuming improved carrier performance, this evidence is supportive of petitioners' contention that the surcharge creates an intimidating effect upon other shippers and receivers. This conclusion is reinforced by the testimony of Herman Grappel who indicates that his company reduced or modified its claims filing practices because of a concern that Conrail would impose a surcharge on them as well. Mr. Grappel testifies that his Company, George Tiefer purchases $200 million dollars of produce a year for the Waldbaum Food Chain, at least $20 million of which represents potatoes. Tiefer substantially reduced its claims activity after the surcharge, although Grappel states that the "claims" not filed were valid and legitimate. He testifies that this reduction in claims filing was done in order not to incur a

reaction from Conrail (Grappel 10/26/89 Tr. 27-30; see also SA Exhibit E).

E. *Santa Fe Surcharge*

In early June, 1989, shippers and brokers that petitioners did business with in California were told that the freight rate on the Santa Fe line to Kingsbridge was increased by an additional $500. This second carrier surcharge increased the freight rate on shipments originating on Santa Fe and delivered by Conrail to Kingsbridge to $7,100 or $1,100 higher than the rate applicable to other consignees located at Hunts Point. Santa Fe does not provide the only rail service to the east from the Bakersfield, CA area (SA, Exhibit C).

Santa Fe does not transport idaho potatoes. It transports white, red and non-idaho russet varieties. In the case of California potatoes, Santa Fe faces competition from the Southern Pacific and Union Pacific Railroads. From the Bakersfield area, the service of Southern Pacific is available and Union Pacific is available from Stockton, CA.

Moreover, Santa Fe does not operate refrigerated box cars except through third parties such as Fruit Growers Express.

At the outset, Santa Fe either refused to provide an explanation for this increase or gave versions which appeared

to change from day-to-day. Santa Fe told G. &. T.'s broker that the railroad could "charge what they want" (A11). Richard Scofield told Linda Strumpf on June 5, 1989 that Santa Fe was now deregulated and that the increase was based on "supply and demand, cost increases, etc, and that Santa Fe is not required to give an explanation." Scofield further stated that he did not think that Santa Fe would give an explanation but he would discuss the matter with his superiors. He also refused to confirm the rate in writing and then later advised petitioners that Santa Fe did not want to put anything in writing but would only quote rates over the telephone. (See Strumpf's affidavit submitted with petitioner's motion to join Santa Fe.)

In opposition to petitioners' motion to join Santa Fe, both carriers denied having any contact with each other about the surcharge action (A12).

Neither carrier has been fully accommodating in response to petitioners' efforts to obtain information as to what happened and why. For example, petitioners, in Interrogatory Nos. 18 and 19, request information about communications between Santa Fe and Conrail before Santa Fe imposed the surcharge. Santa Fe despite its original denial in its brief on the motion to join them as a party, admits that phone conversations took place between the attorneys for Santa Fe and Conrail. It refuses to disclose such conversations, however, arguing the conversations are protected from discovery by client-attorney privilege.

Although both Conrail and Santa Fe claim they did not conspire together, it is clear their lawyers were in communication and they fail to provide an explanation concerning those communications. Conrail as well simply denies any contact (A12).

In addition, although Santa Fe in its answers does not indicate additional conversations with non-attorneys, the documents submitted reveal that Mr. Halsey of Santa Fe spoke with Stephanie Cohen of Conrail on May 8, 1989 (A26). Santa Fe originally denied that there was contact or communication between the carriers. This statement obviously is not correct and the carrier resists providing an explanation of its actions.

The information that has been provided by Santa Fe indicates that the carrier decided in the spring of 1989 that the claims filed in connection with shipments to G. &. T. were excessive.

Again, as was the case with Conrail, there was no advance communication or discussion with petitioners. (A32) Moreover, Santa Fe's rules do not limit the extent to which claims can be filed (A34 and 35). Santa Fe also never advised petitioners and has no rule or policy which would warn shippers or receivers that the railroad reserves the option to impose freight charges at its discretion in the event that they disapprove of the amount of claims activity initiated with regard to that traffic (A32).

A complete analysis of the Santa Fe claims activity is set forth in the affidavit of Linda Strumpf. (A13) From this analysis it is apparent that most of the claims filed by petitioners were found to be valid by Santa Fe since Santa Fe agreed to pay amounts in settlement of these claims.

Ms. Strumpf's affidavit in the Supplemental Index also responds to the contentions by Santa Fe and Conrail with regard to the Santa Fe surcharge.

Ms. Strumpf provided a detailed analysis of the claims filed with Santa Fe. (A13-A21) As has been noted, G. &. T. received a total of 92 cars from the Santa Fe system for the years 1986 through 1988. There were 25 claims filed on these shipments, 16 of which were paid and 9 were denied. (A20) Santa Fe nevertheless has continued to contend that the claims experience with G. &. T. was the basis for the surcharge they imposed and that such action was justified by this claims experience. In her supplemental affidavit Ms. Strumpf emphasized that Santa Fe does not dispute the fact that G. &. T. was paid on approximately 66 percent of the claims filed. (Exhibit I, p. 5) Ms. Strumpf further estimates that G. &. T. has been paid on approximately 75% to 80% of the claims it has filed with all railroads since 1983. The majority of claims which G. &. T. has filed have been supported by USDA inspection reports which is evidence that petitioners have not acted capriciously or without justification. Citing both the documentation that has been provided and the percentage of paid claims by the

carriers, it is Ms. Strumpf's contention that both Conrail and Santa Fe have punished petitioners with the imposition of surcharges simply because petitioners have been filing "valid claims" (Exhibit I, p. 5-6).

F. *Petitioners' Allegations of Harassment*

Petitioners have asserted some evidence of harassment. Mr. Spinale, in his affidavit of May 15, 1984 details a number of incidents which constituted poor service or mishandling of shipments (NJA 85 et. seq., pars. 9 through 18. See also p. 98, 100, 101 and 103).

In 1989, the dispute between Conrail and petitioners expanded into a significant new area. In April 1989, G. &. T. was advised by Conrail's manager of freight collections that it had adopted a new "Rule 10" requiring the payment of all disputed mechanical detention and/or demurrage charges and indicated that Conrail would refuse to accept any rail cars for delivery to G. &. T. unless payment was made within thirty days. Conrail also insisted upon the posting of a Letter of Credit in the event of non-payment. This action was the subject of a motion by petitioners filed May 26, 1989. As to Rule 10, the Commission determined that a request by petitioners request for injunctive relief should be denied. Petitioners' motion to amend the instant petition with regard to Conrail Rule 10 action, however, was granted. (Decision of June 13, 1989, served June 22, 1989).

Details of this threatened embargo is set forth in the December 19, 1989 Affidavit of Linda Strumpf (A-205 et. seq.) The Strumpf Affidavit also sets forth an additional Conrail threat to embargo services to G. &. T. unless G. &. T., at its own expense, carried out track repairs deemed necessary by the rail carrier (A-209-211). Conrail's actions with regard to Rule 10 and the posting of security through a Letter of Credit and the proper demands for track repairs do not necessarily constitute discrimination and/or harassment of G. &. T. In light of the timing of these actions, the manner in which the demands were presented, and the specific responses sought by Conrail, such action may not be separate and apart from the surcharge dispute between the rail carrier and the petitioners, but this is not clear.

In 1989, this petition was reaching maturity before the Commission in terms of review and action. At the same time that petitioners were proceeding to complete a difficult evidence gathering process involving both carriers, Conrail and Santa Fe, identified a new area of dispute.

The additional costs for necessary security and repairs, together with the cost of the surcharges that resulted from Conrail and Santa Fe action, increase the likelihood that petitioners will not be competitive but only the rate actions are relevant.

G. *Petitioners Are Captives Of The Railroad For Shipment of idaho Potatoes*

The effect of the Conrail surcharge stems from the fact petitioners do not have an economically viable alternative to rail shipment for idaho and perhaps other western potatoes. idaho potatoes in particular are distinctive potatoes. Potatoes from the east or other nearby locations which can be serviced by truck in terms of customer acceptance cannot be substituted for idaho potatoes. G. &. T., prior to the surcharge, was a leading distributor of idaho and western potatoes in the New York City area. The imposition of the surcharge has substantially damaged G. &. T.'s idaho potato business resulting in a major diminution of this part of the company's business (Spinale aff. A36 et seq., N.J.A. 53, 58; See also A-5).

Evidence supporting petitioners' contentions concerning these matters are set forth in Mr. Spinale's affidavits (See N.J.A. 53, 84 and A 36).

The statements of G. &. T.'s customers corroborate that G. &. T. was the principal supplier of idaho potatoes to companies such as Waldbaum's, King Kullen and Pioneer Stores (A6 to 8). These are all large food chains in the New York city area.

In the New Jersey area, G. &. T. had been the principal supplier to Grand Union, Shop-Rite and Acme markets.

The testimony of Herman Grappel explains fully the problem the surcharge created for petitioners' with their customers. His testimony explains why idaho potatoes are considered distinctive potato for which there is no other substitute (89 Tr. p. 52 to 56; See also SA Exhibit D). Mr. Grappel also confirms the problem that G. &. T. had with his customers because of the surcharge. Mr. Grappel states that before the surcharge G. &. T. was Waldbaum's primary fill-in supplier for potatoes. After the surcharge, G. &. T. had difficulty in maintaining their customers (89 Tr. p. 18 to 21).

In response to Conrail questioning about the ability to ship idaho potatoes by means other than rail, Spinale provided an extensive explanation as to how rail was the cheapest. He would use truck or piggy-back only where it was absolutely necessary to obtain the product. It is economically prohibitive for him to use any means other than rail on a regular basis (89 Tr. p. 39 to 42; 70 to 71).

Although Conrail does not accept these contentions, the weight of the evidence supports petitioners' in their contentions. Shortly after plaintiffs instituted suit in New Jersey against Conrail, its counsel asked Conrail staff to provide information concerning how potatoes are shipped

from western states to the east. Conrail's memorandum dated April 10, 1984 states "idaho ships 38% of this area's potatoes and receipts and rail is the dominant mode of transportation" (N.J.A. 274). Attached to this memorandum is a Conrail chart that breaks down shipments from all areas of the country. It shows shipments from three western states; idaho, California and Oregon. Of a total of 191,700 tons shipped from idaho, 186,600 were shipped by rail. The amount shipped from California and Oregon are much lesser in amount. These areas, however, also are equally dependant upon rail for lost-cost transportation (N.J.A. 275).

Petitioners do not rely simply upon the fact that their potatoes are shipped by rail from western states. They make periodic inquiries to their brokers and are repeatedly advised that there is no competitive alternative to rail service for western potatoes moving to the New York City market area.

In addition, petitioner have made arrangements to have potatoes shipped via piggy-back. This has provided a direct comparison of prices. In response to Conrail's interrogatory 9(b), petitioners provided the following price comparisons between their rail costs and piggyback rates:

5/27/86	- Piggyback	-cost per 100 lb. bag	$6.81
5/27/86	- Rail[2]	-cost per 100 lb. bag	5.88
6/2/88	- Piggyback	-cost per 100 lb. bag	8.67

---

[2] Including surcharge

6/2/88 - Rail[2] -cost per 100 lb. bag 5.74(A 146)

Even with the surcharge, rail boxcar is still the cheapest mode of transportation for the shipment of potatoes from western states to the New York City area. As a practical matter, therefore, petitioners do not have available a competitive alternative form of transportation and are forced to use rail boxcar transportation for the shipment of potatoes if they wish to continue in business.

In terms of the impact of petitioners' business, this is established by the history of freight car shipments to G. &. T. For the years 1980 through 1983, G. &. T. received an average of 433 freight car shipments per year. For the years 1984 through December 1989, including freight car shipments purchased through other companies, G. &. T. shipments have dropped approximately 200 freight cars per year. For this period, G. &. T. averaged approximately 225 cars a year (Affidavit of Ms. Faraci, A 5).

This 50% reduction in freight car shipments represents a substantial decrease in G. &. T.'s idaho potato business. This loss cannot be explained by market conditions. The only reason for such a drop in business in the very area where G. &. T. was dominant is the surcharge.

Given the distinctive nature of idaho potatoes, G. &. T. has suffered a substantial loss of business. G. &. T. and the other petitioners, through extra effort are able to maintain a successful business in other products. The loss of the idaho potato business that G. &. T. has experienced, however, is attributable to Conrail's surcharge.

H. *Application Of Surcharge To Any Company That Does Business With Mr. Spinale Or Petitioner Companies*

Conrail has not limited the surcharge to G. &. T., Mr. Sprout and Tray Wrap. It has applied the surcharge to other companies thought to have an affinity with or to be friendly to G. &. T., Mr. Sprout or Tray Wrap. In essence, Conrail has "red lined" any shipments which it believes may ultimately be sold to petitioners through other companies friendly to them.

Country Wide has joined as a petitioner in this proceeding because it is also required to pay a surcharge although it has filed few claims against Conrail. The same is true of a second company, Produce Packing (A3); although this concern does not join in the petition.

Neither of these companies is owned by Mr. Spinale. Country Wide is owned by Gary Speier and it is not a wholly owned or partially owned subsidiary of any company owned by Mr. Spinale. (A1) Country Wide is in the produce

business. It buys on its own account and sells at wholesale. It also acts as a commission merchant and sells on consignment from farmers.

Country Wide has purchased freight car loads of potatoes which it has sold to G. &. T. for a profit. Whatever dispute Conrail has with the other petitioners, it does not have a similar basis for imposing a surcharge on Country Wide merely because it has a friendly relationship with Mr. Spinale. Country Wide's claims history does not warrant such action. The imposition of a surcharge on Country Wide can only be explained as part of a Conrail's effort to follow G. &. T. without bounds.

The identical situation has occurred in connection with Produce Packing. This company also is owned independently of G. &. T. It operates out of Kingsbridge and shares friendly space with petitioners. It also has on occasion bought freight car loads of potatoes and offered them to G. &. T. for resale at a profit. Produce Packing has been in existence since 1976. It is not owned by Mr. Spinale and has its own separate identity. (A36) It has never filed for payment of claims by any railroad including Conrail. Nevertheless, its purchases of potatoes are subject to Conrail's surcharge.

Conrail interjects an issue of "market power" which it appears to equate to "market dominance." The two terms are somewhat similar in meaning but the implications are

vastly different. Market dominance is a jurisdictional predicate for a rail rate reasonableness proceeding. This instant matter is not such a proceeding.

Conrail denigrates the importance to New York City consumers of idaho and other western potatoes. In fact, Conrail says that idaho potatoes are fungible with eastern potatoes. This contention is false and is rejected. The competition resulting from the availability of eastern potatoes in a macro economic sense may somewhat cause a reduction in the price of idaho potatoes and possibly even their transportation rates. However, in the New York City area, idaho potatoes are distinctive and command a premier position in the potato market. Also, the delivered price is much cheaper by rail and a receiver thereat who has a significant higher rail rate than another New York City area idaho potato receiver is highly disadvantaged. As to idaho and other western potatoes, Conrail has market power over petitioners.

Of course, Conrail is correct in that in a general sense potatoes are potatoes. Nonetheless, in a vital "micro" sense important to petitioners Conrail errs. Marginally relevant "big picture" findings offered by Conrail next follow and are included for reasons of completeness, although such Conrail offerings fail to address petitioners' idaho potato plight.

Potato wholesalers and retailers in the New York can, and do acquire potatoes from nearby states to compete with potatoes from western origins.

CSX competes with Conrail for movements of western potatoes to eastern origins and one shipper located at Philadelphia on CSX competes with G. &. T. in the southern New Jersey market (Conrail Reply, Vol. 2, V.S. Ritenour).

Conrail seeks to demonstrate that 12 different railroads can serve the New York City area directly or through intermodal service (Conrail Reply Vol. 2 at 22-25), but only Conrail can provide connecting rail service from western origins to the New York City area.

Conrail also shows generally that from all western origins, railroads carry only 40 percent of the potatoes destined to all eastern locations (Conrail Reply, Vol. 2, V.S. Casavant at 13-16).

Conrail's economic expert explains that such data indicate that overall Conrail is operating in a market which is highly competitive (Conrail Reply Vol. 2, V.S. Braeutigam at 14).

The two largest western potato producing states are Washington and idaho and their shipper associations support Conrail. The carrier says that eastern potatoes are the same

as idaho and other western potatoes but it seems doubtful that associations would agree (Conrail Reply, Vol. 2, V.S. IGSA and V.S. NWPSCA).

The idaho Association's statement details its members' business dealings with Mr. Spinale's companies. The Association finds that, since deregulation, the number of damage claims filed by its members is lower, rail service is improved, the rail industry is more responsive to shippers' concerns, and service accountability is far greater (Conrail Reply Vol. 2, V.S. idaho Grower Shippers Association).

The Northwest Perishable Shippers Cooperative Association of Washington State finds that, since deregulation, there is better rail car supply, improved speed and consistency in rail service and transit time, stable, predictable transportation rates, and reduced product damage (Conrail Reply Vol. 2, V.S. NWPSCA at 2-4).

Shipper groups from North Dakota, the Red River Valley, Arizona, California, Oregon, Colorado and Wisconsin report similar findings (Conrail Reply Vol. 2, V.S. Casavant at 19-23).

Conrail's experience is that damage claims filed by its agricultural commodities shippers since deregulation became effective are reduced (Conrail Reply Vol. 1, V.S. Kurt at 13).

In addition to the foregoing, Conrail submits a number of "negative" findings which may be marginally relevant. These are next stated.

Petitioners do not specifically identify all of the New York City area receivers who are advantaged in relation to the disadvantage to petitioners by the action of Conrail in imposing a damage claim penalty on petitioners (Conrail Reply Vol. 1 at 20-21). However, there is no doubt that such receivers exist. Some are identified by witness Koerpel of the Southern Pacific Railroad. Conrail itself refers to other potato receivers in the city of New York.

Petitioners fail to join as parties to this proceeding the other railroads that participate in the traffic at issue. The traffic in this proceeding originates in six different states and involves five origin carriers and three intermediate carriers (Conrail Reply Volume 5 at 3). The through rates applicable to the traffic differ significantly by origin and destination, season and equipment type (id.). Nonetheless, Conrail keeps for itself all of the surcharge, this even through damage claims are shared by all connecting carriers when such claims are validated and actually said to a shipper. Further, whatever the origin, destination, reason or equipment, the rail siding of petitioners is taxed higher by Conrail than other sidings. Moreover, as noted only Conrail pockets the special tax imposed on petitioners, except that Santa Fe also wholly pockets its own special tax on petitioners. Conrail also incorrectly argues that the subject tax involves the rate

reasonableness and market dominance provisions of ss 10701(a) and 10709 of the ICA (Introduction to Conrail's Reply at 5).

General competition in agricultural markets keeps both motor and railroad rates relatively low. Manipulation by Conrail's or by its connectors probably would not produce revenue/variable cost ratios in excess of jurisdictional threshold for rate reasonableness (Conrail Reply Vol. 1 at 15-16, V.S., Wilke). However, this is a discrimination proceeding, not a rate reasonableness case, and a R/VC ratio is not relevant.

As to petitioners contention that other perishables shippers are deterred from filing loss and damages claims for fear of retaliation by Conrail, the evidence shows that loss and damage claims are now fewer in number than ever before (Conrail Reply Vol. 1 at 25-26, V.S. O'Reilly; Vol. 2, V.S. Casavant). Conrail claims dropped by about 70% following establishment of the tax on the G. &. T. siding.

The evidence submitted by petitioners that Conrail's surcharge deters receivers from filing claims partially is supported by the deposition testimony of Mr. Grappel (Pets' Brief at 67). Mr. Grappel's company filed more, loss and damage claims with Conrail after Conrail's July 1983 surcharge (Conrail Reply Vol. 1, V.S. O'Reilly at 3-4). Nonetheless, claims dropped by about 70 percent following imposition of the tax on G. &. T. Moreover, Tiefer from

whom Grappel works filed claims with the originating carriers prior to the surcharge. Furthermore, even after the surcharge, the claims filed by Tiefer against Conrail are minuscule in relation to the total multimillion business of Tiefer (Tiefer filed for only $6,000 in claims over 4 years after the surcharge).

Salaries and bonuses paid by petitioners to Mr. Spinale in the years after 1983, are higher than those paid in any of the years preceding the Conrail revenue increase (Conrail Reply Vol. 5, V.S. Saperstone at 11-14).

Petitioners' testimony with respect to a reduction of G. &. T. sales after Conrail's tax on petitioner as noted includes sales to George Tiefer, Inc. (Pets' Brief at 103). The highest volume of sales by G. &. T. to Tiefer occurred after the increase in Conrail's revenue requirement but not with respect to idaho and other western potatoes (Conrail Reply Vol. 5, V.S. Saperstone).

Overall, G. &. T. shows consistent sales and revenue growth in virtually all years since 1983. G. &. T.'s major customer base is the same before and after the rate increase. The sales volume to these customers generally grew between 1984 and 1987. Profit margins for G. &. T. in the post-revenue increase era show increases, as did officers' salaries (*id.*). However, the sale of idaho and other western potatoes is significantly reduced, whereas the Brussels

sprouts business is increased. (There is scant evidence concerning tomato sales.)

Mr. Spinale increased his personal income from Mr. Sprout and G. &. T. by 70% from 1984 to 1988 and averages over $1 million per year in salary during the post-revenue increase period (*id.*), but at the same time salary of Spinale or of Conrail officials appears non-relevant. Moreover, there is no question that G. &. T. has lost western potato business as a result of the Conrail surcharge.

Because of G. &. T.'s non-payment of mechanical detention and demurrage charges between 1985 and the present, the interest on such unpaid charges is close to the amount of the Conrail revenue increase. However, Conrail is drawing down on a G. &. T. "Letter of Credit".

Comparing the freight loss and damage claims payment per car made to G. &. T., versus those made to other Conrail potato receivers on average, and the average unpaid detention and demurrage charges between G. &. T. and other potato receivers, establishes that even with the 1983 Conrail revenue increase, G. &. T. might be able to reduce its net transportation cost assuming no G. &. T. demurrage charge payments. However, petitioners have a contingent demurrage liability of a major amount, and as noted a letter of credit placed by G. &. T. is being drawn down by Conrail on account of unpaid demurrage.

Petitioners' allegations of fraud are specifically directed against RPIA and MDT (Pets' Brief at 81). Petitioners have not named these entities as parties here, nor does the Commission have jurisdiction over them (Conrail Reply Vol. 3 at 5). However, as noted previously, Conrail is well aware of the practices of RPIA and MDT and, in fact, endorses those practices.

Conrail asserts that its tax on petitioners is based upon the cost of processing petitioners' claims, not on the merits of those claims. (Conrail Reply Vol. 3 at 6-7). Nonetheless, as previously shown the Conrail surcharge is far in excess of the cost of processing claims.

One court found, inter alia, that petitioners were "unable to point to a single illustration of impropriety" and unable "to point to any particular report involving produce shipped by an [petitioner] *** fraudulently altered". *G. &. T. v. Smith*, No. 14383/83 (N.Y.Sup.Ct., N.Y.Cty., December 5, 1983) (Conrail Reply Vol. 3 at 10). Here, some examples are demonstrated in altered temperature tapes, but more basically there is an effort by RPIA and MDT to make claims processing more difficult and more expensive.

With specific respect to petitioners' claims against RPIA, RPIA inspectors are instructed by superiors not to state the cause of observed damage when that cause is not physically seem by them (Conrail Reply Vol. 3 at 10). As

previously noted they are instructed not to use their best judgement. Plainly, unless they are in the car during transit, they cannot observe the physical event at the time it happens.

Petitioners' claims with respect to MDT are based in small part on affidavits filed by a former MDT employee (and his son) who was discharged for fabricating inspection reports on cars he had not seen, and for misappropriating company funds (Conrail Reply Vol. 3 at 18-20; V.S. Klous). Notwithstanding, the findings herein are warranted with or without the testimony of the two individuals.

Conrail believes that four examples of recent RPIA and MDT report falsification are without basis (Conrail Reply Vol. 1, V.S. Kurt at 13-16 and Vol. 3 at 22-27). Petitioners' example 2 shows that $3,750 of the $5,000 claim was actually paid (V.S. Kurt at 14-15); and in example 3, $2,500.00 of the $2,958.07 claimed was paid (*id.*). Payment of the claims, however, confirms that the claims were valid, even in the face of apparent report falsification.

Petitioners failed to produce testimony by an RPIA inspector that he changed a report to reflect a different temperature, or percentage of decay, than he actually observed and recorded (Conrail Reply Vol. 3 at 13 and the depositions of Restitudo Mil, Jr., October 10, 1989 at 73-74; John D'Orlando, October 18, 1989 at 49-50; Daniel Arcery,

October 12, 1989 at 49; Robert Driscoll, October 19, 1989 at 134-35; Louis Maniaci, October 12, 1989 at 54-56).

Clearly, RPIA and MDT do not regularly engage in report falsification, although isolated instances occur. Basically, RPIA and MDT engage in half truth reports which are misleading and increase the cost of claims processing for all concerned.

As to the MDT, the testimony of Mr. Bulwin and Mr. Sargeant, whose depositions were taken by petitioners, is that they were not to write inaccurate reports or to change facts they had observed (Deposition of Leonard Bulwin, October 31, 1989, at 28-29; Deposition of George Sargeant, October 31, 1989, at 43-46).

Mr. Bulwin testifies that he was approached by Mr. Spinale who offered to "make it worth [his] while" if Mr. Bulwin would sign an affidavit supporting petitioners' claims of fraudulent inspection practices (Bulwin Dep. at 126).

Conrail also contends notes for example, that petitioners loaded an empty railcar with garbage (Conrail Reply Vol. 4, V.S. Corcoran at 5); that they blocked Conrail's removal of a car with a trackmobile and then complained that Conrail had not removed the car (Conrail Reply Vol. 1. V.S. Roberts, Vol. 4, V.S. Klous); that when a railcar required refueling, petitioners pulled away the car when MDT has sought to refuel it directly from the fuel

truck, thus requiring MDT to refuel 500 gallon tanks by hand with 5 gallon fuel cans (Conrail Reply Vol. 4, V.S. Klous and Appendix at 20-26); and that diesel fuel has been stolen many cars located at the Kingsbridge facility (Vol. 4, V.S. Klous).

Moreover, petitioners are said to have threatened or hindered some inspections by Conrail's agents, MDT and RPIA. Mr. Spinale is said to have chased RPIA inspector Licitra from his siding with a knife (Conrail Reply Vol. 4, V.S. Goss).

Mr. Spinale also is said to have jostled an MDT or RPIA inspectors while he was performing an inspection in a railcar (Vol. 4, V.S. Klous, Goss), and he is said to have set loose his dogs on MDT inspector Bulwin while Mr. Bulwin was making an inspection (Deposition of Mr. Bulwin, Vol. 4 at Appendix 122-138).

RPIA attorney Hillenbrand also is said to have been physically threatened by Mr. Spinale. Mr. Spinale also filed a disciplinary claim against Hillenbrand (Conrail Reply Vol. 1, V.S. Hillenbrand).

The allegation in the above five paragraphs are serious and, if true, warrant criminal action against Mr. Spinale or his agents. However, there is no evidence of criminal action. Moreover, the incidents, even if true, appear not to have a material cost effect in comparison to the

overall scope of this proceeding. Indeed, Conrail admits that the incidents are not quantified in cost terms. On this record, I am unable to measure the merits of the asserted criminal activity of Mr. Spinale.

With respect to Rule 10, on March 21, 1989, Conrail amended its Exempt Perishable Circular No. 1C to add a new Rule 10 which requires any customer who fails to pay mechanical detention and demurrage charges for 90 days, upon 30 days notice, either to settle its account or secure an irrevocable letter of credit to guarantee payment of future detention and/or demurrage bills. Should a customer fail to do either within 30 days, Conrail will notify its connecting carriers and suspend its acceptance of any cars at interchange for delivery to that customer (Conrail Reply Vol. 1, V.S. Roberts, Vol. 4, V.S. Sprows at 5). Rule 10 applies to all perishables shippers who fail to pay detention and demurrage charges (Vol. 4, V.S. Sprows).

On April 26, 1989, Conrail sent letters to petitioners notifying them of Rule 10 and advising that they were more than 90 days in arrears in paying detention and demurrage charges; Conrail never received an acknowledgement of any of these notices until May 25 when the petitioners asked the Commission to enjoin Conrail from implementing a service suspension under Rule 10. Simultaneously, petitioners filed a court action seeking to prevent Conrail from enforcing the provisions of its circular (Conrail Reply Vol. 4 at 6).

The Commission concluded that it had exclusive jurisdiction over the lawfulness of the service suspension and denied petitioners' motion to enjoin because it found that Rule 10 was not being applied in a discriminatory fashion, was not unreasonable in light of petitioners' ability to pay for the letter of credit, and was warranted given the magnitude of petitioners' default on the charges themselves (G. &. T. v. Conrail (June 13, 1989), Slip op. pages 2-3) (Vol. 4 at 8). Petitioners withdrew their court challenge (Vol. 4 at 9).

Thereafter, petitioners G. &. T. and Produce Packaging posted letters of credit on July 25 (Vol. 4 at 6, V.S. Sprows). Because petitioners continue to refuse to pay these charges, Conrail has drawn down on the letter of credit several times (*id.*).

Because the Rule 10 program applies to all perishables customers, Conrail notified the one other customer who violated its terms, and that customer is said to have promptly paid the outstanding charges (Vol. 4, V.S. Sprows at 7).

As to the condition of the sidetrack at Kingsbridge, Conrail shows that petitioners' sidetrack at one point was in poor condition and in need of repairs so that the safety of Conrail's trains and crews could be assured (Vol. 4 at 12). The track is not owned by Conrail and petitioners have not entered into a sidetrack agreement with Conrail governing

maintenance (Vol. 4, V.S. Mancini at 2, V.S. Corcoran at 9-10). However, the track was repaired by petitioners.

Over the years there has been several derailments on this sidetrack. Conrail hired a firm to inspect the track. The firm found safety-related hazards, and repairs eventually were made (Conrail Reply Vol. 4, V.S. Tubbs).

III *DISCUSSION AND CONCLUSIONS*

Petitioners charge Conrail with violating the discrimination and unreasonable practice provisions of the ICA. Petitioners seek revocation of the agricultural commodities exemption (and the box car exemption) to the extent that potato, tomato and Brussels sprouts traffic is consigned to petitioners and moves on Conrail or Santa Fe. Petitioners also seek monetary damages and injunctive relief.

Petitioners' basic burden is to establish facts that constitute violations of the provisions of the ICA. However, they first must satisfy the provisions of 49 U.S.C. § 10505(d).

Under 49 U.S.C. § 10505(d), petitioners must show that partial revocation of the agricultural commodities and box car exemptions in the context of this proceeding is necessary to carry out the National Rail Transportation Policy (NRTP) as set forth in 49 U.S.C. § 10101(a).

Petitioners' primary case is a claim of rate discrimination in violation of 49 U.S.C. § 10741. Petitioners also claim that this rate discrimination is intended to deprive petitioners of their rights to file loss and damage claims in violation of 49 U.S.C. § 11707. In addition, petitioners raise fraud and harassment issues.

These fraud and harassment issues fit the category of unreasonable practices, if proven, and may be prohibited under 49 U.S.C. § 10701(a).

The bulk of petitioners' case deals with Conrail's decision in 1983 to tax traffic consigned to petitioners' facility at Kingsbridge. As noted, petitioners assert that this tax violates 49 U.S.C. § 10741 concerning rate discrimination. Petitioners' believe that this discrimination, in and of itself, justifies revocation of the exemption.

Under § 10741, a rail carrier will be found to have practiced "unreasonable discrimination" if a complainant proves the carrier received different compensation for performing a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances. 49 U.S.C. § 10741(a). The evidence submitted by petitioners on this point establishes that the rate they are charged by Conrail for the transportation of "western potatoes" is different from other rates assessed for shipments of potatoes to Hunts Point, Mt. Kisco and Mt. Vernon, New York, which are at or near to Kingsbridge, the

latter point being where petitioners do business. Petitioners show the required likeness and substantially similar transportation circumstances necessary for a finding of unreasonable discrimination.

Conrail, in response to the evidence of petitioners, fails to present evidence showing that there are significant differences in transportation circumstances. Except for sum totals relative to the payment of claims and claims processing, the cost of serving petitioners does not differ materially from the cost of serving their competitors. More importantly, the transportation circumstances for receivers at Kingsbridge and other New York City area locations are virtually identical.

The evidence of record establishes that the claims activity of petitioners is proper. There are of course "undercurrents" flowing between the parties in this matter. Conrail, for example, contends that it has experienced stolen diesel fuel, threats of violence, bribes and the like at petitioners' facility. The "cost" of this activity is not quantified. Very importantly, these asserted crimes are not the basis for the Conrail surcharge on petitioners. Instead, Conrail's surcharge is based on inflated and exaggerated figures purporting to show the cost of processing claims filed by petitioners. Past history establishes that most of petitioners' claims are validated by payment.

There is no reason to believe that petitioners cause the damage to their shipments, nor is there any reason to believe that the damage is unique to petitioners. The fact that petitioner G. &. T. exercises its right to file claims while others including one of the petitioners (County Wide) do not, provides no basis for the surcharge. A contrary conclusion would extinguish the statutory right of G. &. T. to file claims.

The evidence presented by Conrail shows that petitioners file hundreds of claims with Conrail. This is far more than the combined total of all other potato receivers served by Conrail. However, as noted, the majority of petitioners' claims are paid. Many other are pending litigation. No fraud or abuse of claims procedures on the part of petitioners is shown.

Petitioners assert as an additional reason for relief that Conrail knowing relies on false inspection reports rendered by inspection agencies in initially denying petitioners' claims. However, I find that there is no fraud as alleged by petitioners.

In terms of civil fraud, there is no reliance by petitioners on false reports. Clearly, petitioners do not rely on the reports of the inspection agencies and are not misled to their detriment. Instead, petitioners spend their own funds for independent inspections by the United States Department of Agriculture. These inspections often validate the claims

of petitioners. There is, nonetheless, extensive evidence showing unreasonable buildup of claims processing costs by the inspection agencies. Conrail encourages this cost buildup. Actively avoiding early and accurate identification of the cause of damage is endemic among the New York City area rail inspection agencies. This is not reasonable and is encouraged by Conrail. Costs, including the costs of processing or settling claims are greatly enlarged by such unreasonable action.

Petitioners have not established that the Conrail's demurrage actions violates any statutory requirement. However, the matter of demurrage was introduced late in the procedural life of this proceeding and is one which requires evidentiary development for fair resolution.

Petitioners show that idaho potatoes are a unique market, and that they are unable to competitively receive these potatoes by any mode of transport other than Conrail. Conrail's evidence fails to show that petitioners have transportation, product and geographic substitutes available. Different types of potatoes compete poorly with idahos if for no other reason than a highly effective state of idaho advertising campaign. Russet potatoes are grown in numerous western and non-western states. They do not supplant idahos.

All of these alternative potatoes, regardless of their state of origin, and even idaho potatoes themselves can be,

and are, transported by truck, and by combinations of rail and truck, that do not involve Conrail. However, into the New York City area, rail is much cheaper. This cost advantage is all important to receivers in the New York City area.

This case also involves Brussels sprouts and tomatoes. Petitioners, Mr. Sprout and Tray Wrap are receivers of Brussels sprouts and tomatoes, respectively. Petitioners submit insufficient evidence concerning these products.

Conrail carries virtually none of these commodities. There were 38 cars of Brussels sprouts and 50 cars of tomatoes on the entire Conrail system in all the years since 1983 combined.

Conrail also notes that recently, petitioner G. &. T. has received virtually no potatoes by Conrail. Indeed, G. &. T.'s principal, Mr. Spinale, asserts that he has been able to get potatoes via other means. This is fine except an idaho is still an idaho and Spinale is entitled to sell them free of Conrail's unreasonable discrimination. Furthermore, there is no reason why petitioners should be cut off from non-idaho western potatoes. Into New York City, rail transport involving Conrail is required for cost effective marketing of western potatoes.

I find no market power on the part of Santa Fe from California origins such as Bakersfield to New York City because of the existence of effective rail competition from other carriers such as Southern Pacific and Union Pacific which do not impose surcharges and are available to petitioners. Stated differently, although the Santa Fe discriminates against petitioners, the latter have other cost effective options relative to this carrier. Moreover, Santa Fe has no real responsibility with respect to the damage inspection practices of the eastern railroad inspection agencies.

Although under the NRTP at 49 U.S.C. § 10101a(13) unlawful discrimination in appropriate circumstances provides a basis for revocation of a Commission conferred exemption, there must be a balancing of all germane NRTP factors. Here, upon review of all 15 of the NRTP factors, including multiple subparts, I find in the case of the Santa Fe that the absence of market power vis a vis petitioners overrides the carrier's discrimination. This conclusion is not drawn lightly because the bulk of petitioners' damage claims are validated by ultimate Santa Fe payment. However, it also appears that the Santa Fe is almost a non-participant in this matter because it provides a relatively minor amount of service to petitioners. SP and UP remain available to petitioners for rail transportation. In my opinion, it is not necessary at this time to subject Santa Fe to re-regulation to carry out the objectives of the NRTP.

Ultimate Findings And Order

I find that partial revocation of the rail box car and rail agricultural commodity exemptions relative to potato traffic moving from origins west of the Rocky Mountains via Conrail to Kingsbridge should be removed for the reasons that (1) Conrail exerts market power over such traffic, (2) The surcharge imposed on petitioners at Kingsbridge by Conrail unreasonably discriminates against petitioners and (3) Conrail endorses unreasonable damage claim processing and reports of eastern railroad inspection agencies.

I also find that the subject of damages should be further developed and that an opportunity for this should be provided.

I additionally find that the subject of demurrage raised by petitioners also should be further developed.

I further find that the revocation action should not extend to the Santa Fe.

I finally find that Conrail immediately should remove its entire surcharge on western potato traffic moving to Kingsbridge.

An appropriate order follows:

The petition for revocation is granted to the partial extent described in the preceding findings and denied in all other respects. In this regard, action by Conrail removing the surcharge, except for the subjects of damage and demurrage,[3] will terminate this proceeding and the exemptions then should be reinstated.

Petitioners and Conrail shall file simultaneous written evidence concerning damages and demurrage by March 18, 1991. Such filings will be designated as Ex Parte No. 346 (Sub-No. 14C). Oral hearing then will be held on March 25, 1991 at Philadelphia, PA.[4]

By Paul S. Cross, Administrative Law Judge, on February 8, 1991.

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[3] The demurrage in question may not be exempt from regulation. No doubt the parties will clarify this question.

[4] Conrail and petitioners filed factual digests and replies thereto at my request. I make liberal use of those digests in this decision. To the extent possible I hope to again use the good offices of counsel in easing the burden of this complex case.

Supreme Court, U.S.
FILED
MAY 25 1994
OFFICE OF THE CLERK

No. 93-1562

In the Supreme Court of the United States

OCTOBER TERM, 1993

MR. SPROUT, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Interstate Commerce Commission erred in declining to revoke a regulatory exemption for the transportation of petitioners' potatoes by respondent Consolidated Rail Corporation (Conrail).

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v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals is reported at 8 F.3d 118 (Pet. App. B1-B30). The decision of the Interstate Commerce Commission is reported at 8 I.C.C. 2d 674 (Pet. App. C1-C47).

JURISDICTION

The judgment of the court of appeals was entered on October 25, 1993. The petition for rehearing was denied on January 3, 1994. Pet. App. A1-A2. The petition for a writ of certiorari was filed on April 4, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case concerns the railroad exemption provisions of 49 U.S.C. 10505, which were enacted as part of the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act), Pub. L. No. 94-210, 90 Stat. 31, as modified and supplemented by the Staggers Rail Act of 1980 (Staggers Act), Pub. L. No. 96-448, 94 Stat. 1895. Section 10505(a) directs the Interstate Commerce Commission (ICC or Commission) to exempt railroad activities from regulation whenever it finds (1) that regulation is not necessary to carry out the rail transportation policy goals set forth in 49 U.S.C. 10101a, and (2) either that (A) the exemption is of limited scope, or (B) regulation is not necessary to protect shippers from an abuse of market power. 49 U.S.C. 10505(a). By using mandatory lang-uage and providing that the ICC "shall" exempt rail service when the statutory criteria are met, Section 10505 was designed to reduce regulation to the minimum necessary to carry out national rail transportation policy goals. See, *e.g.*, H.R. Rep. No. 1430, 96th Cong., 2d. Sess. 105 (1980) (instructing the ICC to use Section 10505 to "reduce its exercise of authority to instances where regulation is necessary to protect against abuses of market power.").

In 49 U.S.C. 10701a(b)(1), a provision of the Interstate Commerce Act added by the Staggers Act, Congress further provided that maximum rate regulation by the Commission is inappropriate except to the extent that a carrier has "market dominance" over the traffic at issue. 49 U.S.C. 10701a(b)(1). Market dominance is defined in 49 U.S.C. 10709(a) as "an absence of effective competition from other carriers or modes of transportation for the transportation to which a rate applies." 49 U.S.C. 10709(a). The statute also provides that common

carriers shall not unreasonably discriminate against shippers. "Unreasonabl[e] discriminat[ion]" in rates is defined as the imposition of different rates by carriers for "performing a like and contemporaneous service" in the transportation of a "like kind of traffic under substantially similar circumstances." 49 U.S.C. 10741(a). There can be no unreasonable discrimination if different rates are imposed for different routes. 49 U.S.C. 10741(f)(4).

Pursuant to 49 U.S.C. 10505, the ICC has issued numerous exemptions from regulation, either individually or as a class, for a variety of selected services, transactions, and commodities, including railroad shipments of potatoes. However, the statute gives the Commission the authority to revoke an exemption, either wholly or in part, if and when it finds that regulation is necessary to carry out the national rail transportation goals of Section 10101a. 49 U.S.C. 10505(d). This case involves the ICC's decision not to revoke the regulatory exemption as it applies to potatoes carried for petitioners by Consolidated Rail Corporation (Conrail).

2. Petitioners are a group of closely-affiliated produce dealers operating out of New York City. Petitioners contract with respondent Conrail to transport potatoes originating in Idaho to their final destination at distribution facilities in and around New York City. Pet. App. B3, C7. Since the early 1980's, petitioners have filed numerous loss and damage claims against Conrail and its predecessors seeking compensation for economic losses due to alleged spoilage of their potato shipments. See 49 U.S.C. 10730 and 11707 (authorizing loss and damage suits). Pet. App. B3, C8-C10. To cover the cost of defending against petitioners' claims, respondent Conrail increased its rates in 1983 by $500 to $600 per car on petitioners' traffic. *Id.* at B4, C10-C11.

3. Petitioners filed suit against respondent Conrail in March 1984 in New Jersey district court seeking revocation of respondent's regulatory exemption for transportation of potatoes. Petitioners argued that Conrail had abused its market power by selectively increasing rail rates on petitioners' traffic.[1] Based on an ICC decision asserting the agency's exclusive jurisdiction over exempted rail transportation, the district court dismissed the complaint, and the dismissal was upheld by the Third Circuit. Pet. App. B4-B5. See *G. & T. Terminal Packaging Co.* v. *Consolidated Rail Corp.*, 646 F.Supp. 511 (D.N.J. 1986), aff'd, 830 F.2d 1230 (3d Cir. 1987), cert. denied, 485 U.S. 988 (1988).

4. Petitioners then petitioned the ICC to revoke the exemption for potato traffic as to Conrail and to order Conrail to reduce its rates on petitioners' traffic. They based their revocation petition on their claims that Conrail's rates for petitioners' traffic were unreasonably discriminatory and an abuse of market power and that Conrail's claims investigation practices were fraudulent and unreasonable. An Administrative Law Judge (ALJ) concluded that the exemption should be revoked. The judge found that "there is no doubt that [favored competitors] exist," and that Conrail had market power which it had abused by charging discriminatory rates. See Pet. App. C22.

5. The ICC reversed. Pet. App. C1-C47. First, noting that Conrail's rates on western potatoes barely covered its out-of-pocket costs, the ICC found that Conrail does not possess, and hence could not abuse, market power on this traffic. *Id.* at C17-C21. Second, the ICC held that petitioners had failed to make out a prima facie case that

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[1] One other railroad imposed similar rate increases, but petitioners have focused only on Conrail in their petition for certiorari.

Conrail's rates unreasonably discriminated against them in a manner that caused petitioners competitive injury, because petitioners had not even identified any of their competitors or their competitors' transportation routes. *Id.* at C22-C24, C27-C28.[2] The Commission further disagreed with the ALJ's conclusion that petitioners had proved competitive injury resulting from the rate increase. Rather, the Commission concluded that petitioners had failed to show that they had suffered any decline in business or in market share following imposition of the surcharge. *Id.* at C24-C27. Finally, the Commission found that Conrail had demonstrated that its rates for petitioners' traffic were justified by "different transportation circumstances"—i.e., the extraordinary expense of serving petitioners that was traceable to the filing of numerous loss-and-damages claims. *Id.* at C28-C30. Relying on the Third Circuit's previous decision in *G. & T. Terminal Packaging Co.* v. *Consolidated Rail Corp.*, 830 F.2d 1230, 1233 (1987), the ICC noted that the statute did not prohibit rail carriers from taking into account the cost of loss-and-damage

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[2] The Commission described unreasonable discrimination under 49 U.S.C. 10741(a) as follows (Pet. App. C21-C22):

> Discrimination is defined as charging different rates for like traffic and services. Longstanding case law has established that, to prove unreasonable discrimination, a complainant must show that a rate disparity exists between the rates it pays and the rates charged to its competitors; that there is actual or potential competitive injury; that the defendant is the common source of both the prejudicial and preferential rate; and that the rate disparity is not justified by transportation conditions. Once the first three elements are shown, the burden shifts to the defendant to show that the rate disparity is justified by transportation conditions. See, *e.g.*, *Dresser Indus.* v. *ICC*, 714 F.2d 588[, 598] (5th Cir. 1983).

claims in fixing transportation rates for particular customers. Pet. App. C29-C30. Because Conrail's conduct would not have been unlawful even in the absence of the exemption, the ICC found that it provided no basis for revocation.

6. The Second Circuit affirmed in part and reversed in part.[3] Pet. App. B1-B30. The court agreed that a threshold inquiry in determining whether rates should be regulated under the statute is whether the carrier has market power, and it affirmed the ICC's holding that Conrail's low rates show a lack of market power. *Id.* at B10-B16. Second, the court affirmed the ICC's finding that petitioners had failed to make out a prima facie case of discrimination under Section 10741. After noting the elements of a prima facie case, the court explained that:

> Petitioners submitted no evidence about who their competitors are, which rail lines their competitors are on, what their competitors sell and which markets they serve, what carriers their competitors use, or what rates their competitors paid.

Pet. App. B18. The court also agreed with the Commission that petitioners had failed to show competitive injury because there was no evidence that their potato distribution business had been harmed by Conrail's rate hike. *Id.* at B19-B20. Finally, the court upheld the agency's finding that Conrail had justified the rate differential in light of the unusual costs of serving petitioners. *Id.* at B21-B23.

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[3] The court remanded to the Commission for the limited purpose of determining whether the carrier's method of investigating claims constituted an unreasonable practice under 49 U.S.C. 10701(a). At petitioners' request, the ICC has held the remanded proceeding in abeyance pending disposition of the petition for certiorari.

ARGUMENT

Petitioners contend that the court of appeals should have revoked respondent Conrail's exemption from regulation because Conrail engaged in "unlawful and discriminatory charging practices." See Pet. 19. The court of appeals' decision is correct, and involves a straightforward application of statutory standards to the facts of this case. No further review is warranted.

As the court of appeals noted, the ICC's application of the exemption provisions at issue is entitled to "the same deferential standard of review as that afforded to other agency proceedings." Pet. App. B9 (quoting *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984)). Petitioners do not challenge the ICC's conclusion that they failed to demonstrate that respondent Conrail possessed market power over the transportation of petitioners' potatoes, see Pet. 12 n.3. Rather, their sole contention is that the rate increase imposed on petitioners' traffic constitutes unlawful rate discrimination under Section 10741(a) of the Interstate Commerce Act, which would justify revocation of the exemption from regulation under Section 10505(d).

The court of appeals agreed with the Commission, however, that petitioners failed to make out a prima facie case with respect to each of the three elements of a discrimination claim under 49 U.S.C. 10741(a), see note 2, *supra*. Specifically, the court noted that petitioners submitted "no evidence" about the identity or market activities of their competitors. Pet. App. B18. The court of appeals explained that, without this information, the ICC "was unable to make a finding that the same carriers served the unnamed competitors or that an alleged rate differential caused competitive harm to

[petitioners]." *Ibid.* Petitioners do not challenge the court's conclusion that they failed to identify their competitors, nor do they explain why the requirement that they identify their competitors is unreasonable in light of their claim that their business suffered competitive injury. Rather petitioners simply repeat the assertion that the imposition of a higher rate on shipments of their potatoes suffices to establish competitive injury. Pet. 26. The court of appeals' rejection of this argument is correct and does not warrant further review.

Petitioners also challenge (Pet. 25-26) the Commission's conclusion that they failed to establish an essential element of their prima facie case of discrimination because they did not prove that their business was significantly impaired following Conrail's rate increase. Petitioners' challenge rests on nothing more than a disagreement with the Commission's assessment of the evidentiary record. As the court of appeals found, however, the Commission's conclusion that petitioners suffered no overall decline in their business following the rate increase is supported by substantial evidence in the record.[4] See Pet. App. C25. Petitioners' fact-bound disagreement with that finding does not merit further review.[5]

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[4] Petitioners stated that rail shipments dropped during the year after the rate increase was imposed. But the ICC noted that rail shipments during the year before the increase were unusually high, and that the drop in shipments simply represented a return to historic levels. The ICC also noted that five of petitioners' seven largest customers, representing 83 % of their total business, bought more potatoes from petitioners after the rate increase than they did during the previous two years. Pet. App. C25.

[5] Petitioners also argue that the Commission should have found competitive injury based on the fact that they raised the prices of

Petitioners also argue (Pet. 22-24) that the Commission erred in its analysis of the "different routes" aspect of the antidiscrimination provisions of 49 U.S.C. 10741.[6] The Commission concluded, and the court of appeals agreed, that petitioners could have no claim of discrimination under Section 10741(f), because no other distributor shipped potatoes to Kingsbridge, which was petitioners' "primary point of receipt." Pet. App. C23, B20. But even if, as petitioners claim, the Commission erred in its factual conclusions regarding the sites at which petitioners received their potatoes, it would make no difference to the outcome of this case. The Commission's finding of no discrimination ultimately rested on its conclusion that petitioners suffered no decline in business, and no competitive injury, from the increase in rates. Thus, the "different routes" analysis is not essential to the outcome in this case.

Lastly, petitioners argue (Pet. 27-28) that the court of appeals erred in upholding the ICC's determination that the expenses incurred by Conrail in responding to petitioners' loss-and-damage claims justified a rate increase. Petitioners maintain that raising rates to cover the cost of petitioners' claims had the effect of "depriv[ing] [petitioners] of their statutory right to file claims." Pet. App. B22. As the Third Circuit noted, however, in rejecting a similar claim at a previous stage

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their product as a result of Conrail's rate increase. Pet. 25-27. But a price increase, standing alone, does not prove competitive injury: as the ICC noted, petitioners failed to show that Conrail's rate increase (or petitioners' price increase) actually resulted in lost business.

[6] In the Staggers Act, Congress expressly limited the statutory prohibition against unreasonable discrimination by specifying that it "shall not apply to * * * rail rates applicable to different routes." 49 U.S.C. 10741(f)(4).

in this case, "[r]ecovery in those pending [loss-and-damage] actions * * * will not be affected by the [rates] here challenged." *G. & T. Terminal Packaging Co.* v. *Consolidated Rail Corp.*, 830 F.2d at 1233. The Third Circuit further observed that, although Section 11707 prohibits rail carriers from relieving themselves of the cost of paying loss or damage claims, "it simply does not deal with what costs may be taken in account in determining rates." *Ibid.* The court stated that there is "no authority—statutory, regulatory, or judicial—for the proposition that carrier liability under section 11707 is not a cost which may be taken into account in fixing rates." *Ibid.* The Court concluded that a carrier is therefore not barred from raising rates to cover the expenses of loss or damage claims. Petitioners cite no authority to the contrary. In any event, as the court of appeals in the instant case pointed out, Pet. App. B21, Conrail was not required to justify the rate it charged petitioners because, by failing to show competitive injury, petitioners did not present a prima facie case of rate discrimination. Thus, this case does not turn on whether rates may be raised to cover the cost of loss and damage claims, and that question merits no further review.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MR. SPROUT, INC., TRAY WRAP, INCORPORATED, COUNTRY WIDE PRODUCE, INCORPORATED, G&T TERMINAL PACKAGING CO., INC.,

Petitioners,

v.

UNITED STATES OF AMERICA, and INTERSTATE COMMERCE COMMISSION,

Respondents,

and

CONSOLIDATED RAIL CORPORATION, and ATCHISON, TOPEKA, and SANTA FE RAILWAY COMPANY,

Intervenors.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

INTRODUCTION

Respondents have not persuasively challenged the important need for this Court to determine whether the Interstate Commerce Commission ("ICC") is improperly permitting deregulated rail carriers to impose illegal discriminatory rate charges against shippers and receivers who file legitimate loss and damage claims. Instead, the Respondents have misapplied a ruling of the Third Circuit from a prior stage of this litigation; have espoused the same flawed burden of proof employed by the ICC and the Court of Appeals; have characterized as non-essential the demonstrably erroneous construction of the "different routes" statutory provision; and have seriously

mischaracterized Petitioners' arguments.

ARGUMENT

THE RESPONDENTS' ARGUMENTS AGAINST FURTHER REVIEW ARE UNPERSUASIVE

I. Conrail Cannot Recoup the Costs of Litigating Claims That Have Been Unreasonably Denied

Respondents do not directly address Petitioners well founded argument that the Court of Appeals, having acknowledged the evidence of Conrail's participation in improper freight inspection practices,[1] should not have sanctioned Conrail's purportedly cost-based justification for the surcharge. Pet.II.C. Instead, Respondents contend that Petitioners' argument is foreclosed by G. & T. Terminal Packaging Corp. v. Consolidated Rail Corp., 830 F.2d 1230 (3d Cir. 1987), cert. denied, 485 U.S. 988 (1988). RB 10. Like the Second Circuit, Pet. B22, Respondents have misapplied this decision, which was rendered at an earlier stage of this litigation.

The Respondents have quoted from the portion of the Third Circuit opinion which rejected the Petitioners contention that the surcharge violated 49 U.S.C. § 11707, which prohibits rail carriers from relieving themselves of

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[1] Indeed, the Second Circuit reversed the ICC's attempt to disclaim authority over these freight inspection practices, and remanded this matter to the ICC for further proceedings under its "unreasonable practices" jurisdiction. Pet. B23-30.

the cost of loss and damage claims. What the Third Circuit did not address -- and, indeed, left for subsequent determination by the ICC -- was Petitioners' claim that the surcharge constitutes unlawful rate discrimination under 49 U.S.C. § 10741. The Second Circuit was the first court to address this novel and important issue relating to rate discrimination.

Moreover, the Third Circuit addressed a much different record from that which was subsequently developed before the ICC. It was after the litigation in the Third Circuit that the ICC, as part of the administrative revocation proceedings, permitted the Petitioners (over Conrail's objection) to depose seventeen witnesses on the issue whether Conrail was endorsing false freight inspection reports. Unlike the Third Circuit, the Court of Appeals for the Second Circuit had before it substantial evidence of false inspection reporting -- evidence that thoroughly undermines the notion that Conrail suffered legitimate freight claims costs which justify the surcharge.

Finally, with regard to the cost-based justification for the surcharge, it bears emphasizing that neither the ICC nor the Court of Appeals concluded that the surcharge was closely equivalent to Conrail's costs in defending loss and damage claims instituted by the Petitioners.[2] To the contrary, the record unequivocally

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[2] After an exhaustive review of the record, the ICC Administrative Law Judge concluded: "Conrail's surcharge is based on inflated and exaggerated figures purporting to show the cost of processing claims filed by petitioners.

demonstrates that the surcharge was not a measure to recoup legitimate costs but an effort to intimidate the Petitioners from filing claims. Pet. 7-8. As the ICC Administrative Law Judge found, Conrail's motivation was demonstrated by the timing of the surcharge as well as the immediate and sharp reduction in loss and damage claims filed by all Hunts Point receivers following the imposition of the surcharge. Pet. D84[3] This Court should not permit the ICC to shirk its duty to remedy Conrail's discriminatory pratices.

Past history establishes that most of petitioners' claims are validated by payment." Pet. D112.

[3] A current telegram which Petitioners have recently obtained documents this potentially expansive problem. Styled an "Addendum to Union Pacific Fresh Fruit and Vegetable s Rates," the telegram provides:

> Effective June 1, 1994 all shipments of perishable commodities originating on the Union Pacific and destined to Morris Okun, Inc. are subject to a surcharge of $500 per car. This surcharge will apply until further notice. The surcharge will be due from the payer of the freight charges, whether it is the shipper, receiver, or broker.

Like Petitioner G&T Terminal Packaging Corp., Morris Okun, Inc. is located in the Hunts Point section of Bronx, New York.

II. Like the Court of Appeals, the Respondents Employ the Wrong Standard of Proof

The Respondents endorse "the Commission's conclusion that [the Petitioners] failed to establish an essential element of their prima facie case of discrimination because they did not prove that their business was significantly impaired following" the surcharge. RB 8. Thus, by their own characterization in their opposition brief, the Respondents acknowledge the ICC's conclusion that Petitioners had the burden to prove actual competitive injury resulting from the surcharge. The rather fundamental flaw in Respondent's argument is that the proof demanded by the ICC has never been demanded in rate discrimination cases.

It is well settled that a complainant need only show the potential for competitive injury to support a claim of unlawful rate discrimination. State of New York v. United States, 568 F.2d 887, 898 (2d Cir. 1977); Harborlite Corp. v. ICC, 613 F.2d 1088, 1098 (D.C. Cir. 1979). The fact that the Second Circuit permitted the ICC to abandon this settled standard of proof cannot be dismissed with the Respondents misleading argument that "Petitioners' challenge rests on nothing more than a disagreement with the Commission's assessment of the evidentiary record." RB 8.

With the proper evidentiary burned in mind, the Commission's assessment of the proof on this issue is clearly erroneous. As the ICC's Administrative Law Judge found, the potential for injury was demonstrated by

the precipitous drop in Petitioners' potato shipments.[4] Moreover, the ICC acknowledged that the Petitioners presented witnesses who testified that their prices rose to non-competitive levels after the surcharge, and that Anthony Spinale (the principal of G&T Terminal Packaging) attributed these price increases to Conrail's surcharge. Pet. C24. Finally, the surcharge indisputably increased the Petitioners' rail rates by 10%, and (by the ICC's own calculation) the surcharge devoured "one-fourth petitioners' markup in potato prices." Pet. C26. These factors clearly demonstrated the potential for competitive injury.

III. The Respondents Cannot Evade the Erroneous Statutory Construction of the "Different Routes" Provision

In its analysis of the Petitioners' discrimination claims, the starting point of the ICC's analysis was its determination that relief was precluded by 49 U.S.C. § 10741(f)(4), which provides that the statutory proscription against discrimination "shall not apply to . . . rail rates applicable to different routes." Pet. C23-24. Again, Respondents miscast Petitioners argument for review, characterizing it as a dispute about the ICC's "factual conclusions regarding the sites at which petitioners received their potatoes." RB 9.

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[4] The ICC did not reject or otherwise disturb this factual determination by its ALJ. Rather, after reciting Conrail's arguments, the Commission merely concluded "it is not clear that petitioners' Idaho business suffered as much as petitioners claim." Pet. C25.

In reality, the Petitioners have demonstrated that the ICC and the Court of Appeals have misinterpreted section 10741(f)(4). First, the "different routes" provision has no application to the form of discriminatory treatment practiced by Conrail, which surcharges the Petitioners regardless of the route or destination of their shipments.[5] Second, the legislative history makes clear that the endpoints which define railway "routes," within the meaning of the statute, encompass much broader geographic regions than the Court of Appeals and the ICC were willing to recognize. Pet. 24 n.8. The question is one of statutory construction -- not factual evaluation.

By sanctioning the ICC's unwarranted expansion of the section 10741(f)(4) exemption, the Second Circuit has significantly limited the scope of the discrimination that is prohibited by the Interstate Commerce Act. Straining to limit this Court's consideration, Respondents argue that "the 'different routes' analysis is not essential to the outcome of this case." RB 9. Respondents' are mistaken in two respects. First, since the ICC began its rate discrimination analysis with its detailed discussion of the "different routes" provision, Pet. C22-24, the Respondents are wrong in arguing that the ICC's "finding of no discrimination ultimately rested on its conclusion that petitioners suffered no decline in business, and no competitive injury, from the surcharge," RB 9. Second, apart from how the Petitioners' discrimination claims are ultimately resolved, the Second Circuit's opinion

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[5] The Court of Appeals failed even to address this argument of the Petitioners, which was fully briefed below.

nonetheless stands as precedent for an unduly limited definition of the rate discrimination prohibited under federal law. The extreme importance of a proper definition in this area is highlighted by Congress's statutory pronouncement that "it is the policy of the United States Government . . . to prohibit unlawful discrimination." 49 U.S.C. § 10101a(13).

IV. The Respondents Have Misidentified the Matters in Dispute

The Respondents strain to present this case as a narrow dispute over a fact-bound administrative record. To that end, Respondents contend that "Petitioners do not challenge the court's conclusion that they failed to identify their competitors, nor do they explain why the requirement that they identify their competitors is unreasonable in light of their claim that their business suffered competitive injury." RB 8. Contrary to Respondents suggestion, these matters are most definitely disputed by the Petitioners.

As the Petitioners pointed out to the Court of Appeals, they did identify their competitors in the course of the administrative proceeding through their responses to interrogatories. Pet. B18.[6] In addition, the ICC Administrative Law Judge found ample evidence in the record -- including references made by Conrail itself --

[6] Neither the ICC nor the Court of Appeals cited any authority for the proposition that Petitioners' responses were inadequate.

identifying competing receivers in the New York City area.[7] Having clearly identified their competitors, the Petitioners' proof quite rationally focused on figures and statistics relating to the operations and profitability of their own businesses. Even if the proprietary information belonging to their competitors were somehow available to the Petitioners, the Court of Appeals did not explain how such data would be relevant (much less essential) to Petitioners' proof that their business declined as a result of the surcharge.

Furthermore, the Petitioners have quite clearly explained why the identification of their competitors was a red herring with respect to this particular discrimination claim. In the typical case of rate discrimination, the railroad targets a selected customer for unfavorable treatment over a selected rail route; the discrimination becomes apparent only by comparing the rate charged to

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[7] The Administrative Law Judge concluded as follows:

> Petitioners do not specifically identify all of the New York City area receivers who are advantaged in relation to . . . the action of Conrail in imposing a damage claim penalty on Petitioners. However, there is no doubt such receivers exist. Some are identified by witness Koerpel of the Southern Pacific Railroad. Conrail itself refers to other potato receivers in the city of New York.

Pet. D100.

the targeted receiver against the rates charged to its competitors for similar traffic. In this case, however, Conrail was so bold as to target the Petitioners with an additional fee -- a separate surcharge over and above its generally available rates -- for their potato traffic to any destination that the railroad services. Competitors' traffic is irrelevant since it is undisputed that only the Petitioners are the subject to the additional surcharge. In short, this egregious add-on charge represents rate discrimination in its purest form.

CONCLUSION

For the forgoing reasons, as well as those previously stated, Petitioners respectfully request that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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